A

TREATISE

ON

ATTACHMENT AND GARNISHMENT.

BY

RUFUS WAPLES, LL.D.

AUTHOR OF A TREATISE ON PROCEEDINGS IN REM, AND A HANDBOOK ON PARLIAMENTARY PRACTICE.

CHICAGO:
CALLAGHAN AND COMPANY.
1885.

T
W 1916a
1885

Entered according to Act of Congress, in the year 1885,
By CALLAGHAN & CO.,
In the Office of the Librarian of Congress at Washington, D. C.

Library
University of Washington
4/1915

RJF 11 May 56

PREFACE.

To render this work useful in every State, I have treated the law and practice, so far as they are uniform in all, as constituting the prevalent system of attachment, susceptible of the application of principles common to all. Peculiar provisions of statutes, anomalous grounds and causes of action, have been considered as exceptional.

That the reader may see whether a decision in exposition of a statute is of more than local value, I have frequently cited the latter with the former. The practitioner, needing to understand the exact terms of a statutory authorization, would have been little aided had I appended synopses of the attachment laws of the several States, since they could not have proved satisfactory.

Attachment is treated as a proceeding personal in form, but against property in effect, to create and enforce a lien to secure ordinary debt. Exceptional attachments, to enforce pre-existing liens, etc., have been distinguished from the usual proceeding.

I have considered Garnishment in connection with the principal subject so far as the rules are common to both; but separate chapters have been given to it so far as the applicable principles differ, and as the practice requires. This arrangement facilitated the work, and I hope it will be found convenient to the practitioner.

The subject of Jurisdiction has been extensively discussed because more errors have heretofore clustered around it than about any other connected with the remedy under treatment.

The term chose in action has been mainly employed in a limited sense as designating notes, bonds, and other evidences of debt.

R. W.

Ann Arbor, Mich.

CONTENTS.

TABLE OF CASES CITED ..... xi.

CHAPTER I.

THE REMEDY OUTLINED.

PAGE.

§ 1. Definitions and Distinctions 1
2. The Suit Personal in Form 5
3. The Suit Against Property in Effect 7
4. Ancillary Proceeding 12
5. The Suit Limited to the Debtor's Property 14
6. Absence of Pre-existing Lien 20
7. Essentials to Create the Lien 24

CHAPTER II.

STATUTORY AUTHORIZATION.

§ 1. General Uniformity 30
2. Non-residents 34
3. Absentees 42
4. Absconding Debtors 47
5. Fraudulent Debtors disposing of their Property to avoid Creditors 51
6. Anomalous Grounds 60
7. The Debt: What Debts are recoverable by Attachment 61
8. Exceptional Attachments 64

CHAPTER III.

THE INSTITUTION OF THE SUIT.

§ 1. The Petition 68
2. The Affidavit — Jurisdictional 76
3. The Affidavit — Matter and Form 79
4. The Affidavit — Indebtedness 86
5. The Affidavit — Grounds 90
6. The Affidavit — Amendments 101

PAGE.

§ 7. The Affidavit — As Evidence 108
8. The Bond — In General 112
9. The Bond — Amount 116
10. The Bond — Obligors 118

CHAPTER IV.

PROCESS.

§ 1. The Summons 128
2. The Writ — in General 132
3. The Writ — as to Property 142
4. The Writ — Protecting the Officer 144
5. The Indemnifying Bond 147

CHAPTER V.

ATTACHING.

§ 1. What is Attachable 151
2. Property Held by Third Persons 159
3. Property Consigned 161
4. Exemption 164
5. Choses in Action 167
6. Method of Seizing 171
7. Time of Seizing 182
8. Wrongful Levy 184

CHAPTER VI.

GARNISHING: AND ATTACHING IN THE HANDS OF THIRD PERSONS.

§ 1. Statute Provisions for Garnishment 190
2. Property in the Garnishee's Hands 194
3. Credits 197
4. Assignment with reference to Garnishment 209
5. Legal Custodians 218
6. Non-resident Third Possessors 226

CHAPTER VII.

CORPORATIONS AS GARNISHEES.

§ 1. States 230
2. Counties, &c 233
3. Cities 236
4. Private Corporations 239

CHAPTER VIII.

RETURN AND PUBLICATION.

PAGE.

§ 1. Description of Attached Property 254
2. Requisites of the Return 257
3. Amendments 260
4. Garnishment Return 265
5. Publication Notice 268

CHAPTER IX.

THE PROPERTY IN COURT.

§ 1. Custody by the Sheriff 279
2. Keepers, Receiptors, &c 283
3. Defendant Holding under the Sheriff 288
4. The Garnishee's Possession 290
5. Sale of Perishable Goods 295
6. Loss of Custody 298

CHAPTER X.

JURISDICTION.

§ 1. Degrees of Authority at Different Stages of the Suit 300
2. Jurisdiction Over the Debtor 304
3. Jurisdiction Over the Debtor's Property 312
4. Statutory Requisites Jurisdictional 321
5. The Court's Authority Special 329
6. Territorial Limits 334

CHAPTER XI.

CHARGING THE GARNISHEE.

§ 1. Nature of the Proceeding 341
2. Interrogatories 348
3. Default 351
4. Exceptions to Interrogatories 354
5. The Answer 357
6. Amended Answer 368
7. Traverse of the Answer 372
8. Charging Order, Interest and Costs 382

CHAPTER XII.

THE DEBTOR APPEARING AND BONDING.

§ 1. Special Appearance 388
2. General Appearance 392

PAGE.
§ 3. Withdrawal of Attorneys—its Effect on Previous Appearance.. 394
4. The Forthcoming Bond..... 396
5. The Bond to Dissolve—its Effect..... 402
6. The Bond to Dissolve—Surety..... 406

CHAPTER XIII.

DISSOLUTION OF ATTACHMENT.

§ 1. The Motion To Quash..... 412
2. Quashing for Errors Patent..... 417
3. Quashing on Evidence beyond the Record..... 425
4. Traverse after Dissolution by Bonding..... 434
5. Dissolution by Final Judgment for Defendant..... 438

CHAPTER XIV.

DAMAGES UPON DISSOLUTION.

§ 1. Reconvention..... 440
2. Suit after Dissolution..... 444
3. The Bond Obligation..... 446
4. Recovery of Costs and Fees..... 450
5. Exemplary Damages..... 454

CHAPTER XV.

JUDGMENT SUSTAINING ATTACHMENT AND PERFECTING THE LIEN.

§ 1. Default after Service..... 459
2. Decree *nisi*..... 460
3. Default after Seizure and Publication..... 466
4. Trial upon Issue Joined..... 468
5. Intervention..... 470
6. Junior Attachers..... 476
7. Claimants..... 480
8. Priority of Seizure..... 485
9. Priority of Garnishment..... 488
10. Simultaneous Seizures..... 492
11. Competition with Mortgage Liens..... 494
12. Sale by the Debtor before Seizure..... 500
13. Assignment..... 502
14. Final Decree, with Privilege..... 506
15. Final Decree against the Garnishee..... 513
16. Garnishee Protected by Judgment..... 520
17. Execution..... 522
18. Garnishment in Execution..... 526
19. Concursus..... 529

CHAPTER XVI.

SUITS RESULTANT FROM ATTACHMENT.

PAGE.

§ 1. Ejectment 531
2. Ejectment: Judgment-Creditors' Sales as to Warranty 535
3. Ejectment: Judgment-Owners' Sales as to Warranty; Difference between them and Attachment Sales 537
4. Ejectment: Attachment Debtors' Sales before Amendment of Radical Defects 544
5. Bond Suits against Attaching Officers 550
6. Replevin Suits against Attaching Officers 553
7. Subsequent Suits against Garnishees 560
8. Suits between Various Parties 565

CHAPTER XVII.

THE REMEDY REVIEWED.

§ 1. Property Liability 570
2. Reason for Attachment Laws Found in Property Liability 573
3. Creation of the Lien 577
4. The Lien Hypothetical 580
5. The Lien Matured by Judgment 582
6. The Lien by Garnishment 587
7. Differences Reconciled 596

INDEX 605

CASES CITED.

[THE REFERENCES ARE TO PAGES.]

A.

Abbott *v.* Semple, 549.
v. Sheppard, 305, 322.
v. Stinchfield, 211, 384.
v. Warriner, 427.
v. Whipple, 449.
Abell *v.* Simon, 353.
Abernathy *v.* Whitehead, 484.
Abrams *v.* Johnson, 180.
Accessory Co. *v.* McCurran, 22, 444.
Achelis *v.* Kalman, 92.
Adams *v.* Abram, 260.
v. Balch, 280.
v. Barrett, 202, 224, 237, 376.
v. Evans, 38.
v. Filer, 560.
v. Jacoway, 123.
v. Kibler, 541.
v. Lane, 221.
v. Merritt, 106.
v. Robinson, 211.
v. Scott, 242.
v. Sears, 472.
v. Tyler, 235, 238.
v. Willimantic Linen Co., 152.
Adams Express Co. *v.* Hill, 391, 394.
Adamson *v.* Jarvis, 148.
Adler *v.* Roth, 21, 172, 176, 280, 281, 287, 530.
Adour *v.* Seeligson & Co., 212, 474, 483.
Albany City Ins. Co. *v.* Whitney, 402.
Albee *v.* Ward, 330.
Albee *v.* Webster, 188.
Albertson *v.* Edsall, 412.
Aldrich *v.* Arnold, 504.
v. Woodstock, 295, 593.
Alexander *v.* Abbott, 276.
v. Denaveaux, 83.
v. Haden, 92.
v. Harrison, 455.
v. Hutchinson, 450.
v. Jacob, 472.
v. Jacoby, 437, 446, 448.
Alford *v.* Cobb, 88.
v. Johnson, 120.
Alleghany Savings Bank *v.* Meyer, [375.
Allen *v.* Blunt, 328.
v. Brown, 106.
v. Clayton, 470.
v. Coates, 394.
v. Erie Bank, 168.
v. Fleming, 92, 99, 419.
v. Gilliland, 530.
v. Hall, 212.
v. Hammond, 538, 541, 542.
v. Hazen, 358.
v. Kinyon, 98.
v. Lee, 549.
v. McCalla, 180, 187, 499.
v. Megguire, 212.
v. Morgan, 202.
v. Watt, 361, 520, 560.
v. Wright, 47.
Allerton *v.* Eldridge, 400.
Allison *v.* Wilson's Executors, 224.
Alston *v.* Clay, 219, 222.

Alston *v.* Newcomer, 39, 43.
Am. Ex. Bank *v.* Morris C. & B. Co., 586.
American Bank *v.* Rollins, 355.
Am. Ex. Co. *v.* Smith & Crittenden, 163.
American Land Co. *v.* Grady, 67.
Amos *v.* Allnutt, 118.
Amos *v.* The Supervisors, 559.
Anderson *v.* Coburn, 27, 270, 322, 325, 333, 390, 548.
v. Graff, 262.
v. Johnson, 319, 417, 465.
v. Odell, 212.
v. Scott, 252, 253, 258, 261, [265.
v. Shaffer, 328.
v. Sutton, 83.
v. Wehe, 81.
v. Young, 560.
Andrews *v.* Glenville Woolen Co., 448.
v. Herring, 214.
v. Kaufmans, 485.
v. Ludlow, 168, 194, 201, 212.
v. Ohio R. R. Co., 274.
Anet *v.* Albo, 436.
Anthony *v.* Comstock, 284.
v. Wood, 503, 504.
Archer *v.* Claflin, 94, 427.
v. Noble, 145, 188.
Argyle *v.* Dwinel, 174.
Arlege *v.* White, 218.
Armor *v.* Cockburn, 195.
Armstrong *v.* Blodgett, 427.
Arnold *v.* Nye, 276, 315.
v. Patrick, 524.
Arthur *v.* Hale, 526.
Ashmun *v.* Williams, 177.
Askew *v.* Stevenson, 423.
Atcheson *v.* Smith, 345, 361.
Atkins *v.* Prescott, 205, 206.
v. Swope, 281, 444.
v. Womeldorf, 105, 142.
Atlantic and Pacific R. R. Co. *v.* Hopkins, 325, 526.
Auerbach *v.* Hitchcock, 27, 54, 92, 98, 322.
Aultman *v.* Stinan, 389.
Austin *v.* Bodle, 338.
Austin *v.* Bodley, 305, 323.
v. Grout, 63.
v. Latham, 83.
Austin & Co. *v.* Burgett, 402.
Avery *v.* Stephens, 21, 581.
Averill *v.* Loucks, 524.
v. Tucker, 222, 230.
Ayres *v.* Harness, 398.

B.

Babbitt *v.* Doe, 276, 315.
Bachelor *v.* Bachelor, 274.
Bacon *v.* Daniels, 284, 409.
v. Leonard, 172, 265.
v. Thompson, 495.
Badlam *v.* Tucker, 159, 212, 281.
Baer *v.* Otto, 110.
Baere *v.* Armstrong, 24.
Bagley *v.* Tate, 472, 497.
v. Ward, 586.
v. White, 288, 319.
Bailey *v.* Adams, 180.
v. Lacey, 356, 527.
v. Myrick, 274.
v. Ross. 212.
v. Wright, 180.
Bainbridge *v.* Alderson, 38, 41, 45.
Baird *v.* Williams, 415, 477.
Baker *v.* Fuller, 286.
v. Hunt, 82.
v. Lancashire Ins. Co., 386.
v. McDuffie, 264.
v. Moody, 213.
v. Warren, 286, 288.
Baldwin *v.* Conger, 251, 262.
v. Cooper, 417.
v. Flagg, 36, 38, 39, 159.
v. Jackson, 177, 288, 314.
v. Murphy, 394.
Baldwin's Appeal, 266.
Ball *v.* Badger, 150, 566.
v. Claflin, 284, 477.
Ballinger *v.* Lautier, 45.
Balt. & Ohio R. R. Co. *v.* Gallahue, 228, 240, 359, 394
Balt. & Ohio R. R. Co. *v.* May, 562.
Balt. & Ohio R. R. Co. *v.* Taylor, 123, 517, 518

Balt. & O. Ry. Co. *v.* Wheeler, 195.
Baltimore *v.* Root, 237.
Balt. Bank *v.* Teal, 68.
Bamberger *v.* Halberg, 480.
Bancroft *v.* Curtis, 158.
v. Sinclair, 261.
Bangs *v.* Beacham, 284.
Bank *v.* Carrollton R. R. 156.
v. Dibrell, 237.
v. Drury, 499.
v. Heath, 451, 453.
v. Johnson, 315.
Bank of Ala. *v.* Berry, 86, 91.
Ala. *v.* Fitzpatrick, 118, 420, 447.
Bank of Augusta *v.* Conway, 122.
v. Cowrey, 27, 420.
v. Earle, 245.
v. Jandon, 477.
Bank of Chester *v.* Ralston, 223.
Commerce *v.* Rutland, &c., R. R. Co., 412, 427, 431.
Fayetteville *v.* Spurling, 477.
Lansinburgh, *v.* McKie, 412,
Louisiana *v.* Stafford, 473.
Northern Liberties *v.* Munford, 361.
Northern Liberties *v.* Jones, 199.
Northwest *v.* Taylor, 252, 261.
the State of Missouri *v.* Bredow, 295.
Tennessee *v.* Dibrell, 230.
the Valley *v.* Bank of Berkely, 428, 430.
Banks *v.* Lewis, 428.
v. Self, 133.
Banning *v.* Sibley, 375.
Bannister *v.* Higginson, 251, 262, 263, 265.
Banta *v.* Reynolds, 144.
v. Wood, 9, 10, 467.
Barber *v.* Parker, 214, 387.
v. Robeson, 49, 156.
v. Smith, 107, 518, 545.
v. Swan, 423.
Bardesley *v.* Hines, 77.
Bardwell *v.* Perry, 525.
Barker *v.* Esty, 202.
v. McLeod, 505.
v. Miller, 281, 284.
v. Osborne, 211, 377.
v. Thorn, 89.
Barksdale *v.* Hendree, 27.
Barlow *v.* Hall, 179.
Barnard *v.* Graves, 196, 222:
v. Sebre, 99.
Barnes *v.* The People, 274.
v. Treat et al., 219, 221.
Barnet's Case, 39, 548.
Barnett *v.* Ring, 309.
v. Watson, 545.
v. Weaver, 223.
Barney *v.* Keniston, 166, 167.
v. Patterson, 49
v. Weeks, 257; Globe Bank, 344
Barnum *v.* Fitzpatrick, 549.
Barr *v.* King, 246, 248.
v. Perry, 357.
Barrett *v.* Spaids, 455.
v. White, 185.
Barriere *v.* McBean, 103.
Barrill *v.* Humphreys, 80.
Barrow *v.* Cobleigh, 280.
v. West, 562.
Barry *v.* Fisher, 205.
v. Foyles, 402, 437.
Bartell *v.* Bauman, 224.
Bartemeyer *v.* Iowa, 560.
Bartholomew *v.* Chautauqua Co. Bank, 545
v. Warner, 536.
Bartlett *v.* Wilbur, 198, 361, 373.
v. Ware, 69, 87.
Bartle *v.* Coleman, 156.
Barton *v.* Allbright, 503, 560, 562.
Bassett *v.* Hughes, 109.
Bastwick *v.* Bass, 362, 363, 373.
Bates *v.* Chicago, &c. R. R. Co., 602.
v. Crow, 9, 10, 13, 19, 275, 312, [323, 424.
v. Days, 344.
v. Delavan, 467.
v. Forsyth, 374, 375.
v. Jenkins, 468.
v. Killian, 437.
v. McDowell, 116.

Bates *v.* N. O. etc. R. R. Co., 203, 227.
v. Plousky, 21, 478, 503, 581.
v. Relyea, 77.
v. Robinson, 83, 103.
v. Tappan, 407.
Battis *v.* Hamilton, 184.
Bauer *v.* Antoine, 436, 438.
Baugh *v.* Kirkpatrick, 295.
Baum *v.* Raphael, 414.
Baune *v.* Thomassin, 63.
Bawden *v.* Schatzell, 600.
Baxley *v.* Linah, 402, 404.
Baxter *v.* Currier, 197.
v. Mo. etc. R. R. Co., 374.
v. Rice, 256, 261.
v. Vincent, 227, 562.
Bayersdorfer *v.* Hart, 13.
Beach *v.* Botsford, 77, 79, 91.
Beal *v.* Alexander, 403, 437.
Bean *v.* Ayers, 285, 286.
v. Bean, 196.
v. Hubbard, 145, 185, 187.
Beardsley *v.* Morgan, 127, 421.
Beasley *v.* Parker, 59.
Beauregard *v.* New Orleans, 329.
Becker *v.* Bailies, 27, 188, 280, 314, 322, 566, 567.
Becker *v.* Dunham, 117, 188, 566, 568.
Beckman *v.* Lansing, 187.
Beckwith *v.* Baxter, 223, 237.
v. Douglas, 269, 322.
Beech *v.* Abbott, 271, 285, 319.
Beecher *v.* Stephens, 272.
Beer Co. *v.* Massachusetts, 560.
Beers *v.* Place, 161, 219.
Behymer *v.* Cook, 166.
Belcher *v.* Grubb, 598.
Belfast Savings Bank *v.* K. L. & L. Co., 69, 87.
Belknap *v.* Gibbens, 218.
Bell *v.* Austin, 546.
v. Craig, 538.
v. Davis, 525.
v. Hall, 105.
v. Western, &c. Co., 509.
Bender *v.* Fromberger, 542, 544.
Benedict *v.* Bray, 25, 118, 127, 420, 422, 447.
v. Gray, 422.
Benedict *v.* Stevens, 601.
Benjamin *v.* Stern, 505.
Bennett *v.* Avant, 49, 51, 92.
v. Brown, 281, 451.
v. Edwards, 86, 94, 322.
v. Wolverton, 483.
Benson *v.* Berry, 161, 177, 219.
v. Carr, 415.
v. Cilly, 18.
v. Hollaway, 361.
Bentley *v.* Shrieve, 222.
v. White, 188, 565.
Benton *v.* Dutcher, 233.
v. Roberts, 403.
v. Snyder, 342.
Bergen Turnpike Co. *v.* State, 330.
Bergh *v.* Jayne, 93.
Bergman *v.* Sells, 488, 489, 582.
Berry *v.* Anderson, 469.
v. Callet, 463.
v. Doty, 466.
v. Nelson, 466.
v. Spear, 259.
Berryman *v.* Stern, 21, 404, 469.
Bessey *v.* Vose, 259, 487.
Betancourt *v.* Eberlin, 507.
Bethune *v.* Gibson, 530, 582, 597.
Betts *v.* Gibbons, 148.
Bickerstaff *v.* Patterson, 252, 253.
Bicknell *v.* Cleverly, 497.
v. Hill, 287.
Bigelow *v.* Andress, 342, 593.
v. Stearns, 330.
Biggs *v.* Blue, 77.
Bildersee *v.* Aden, 407, 409, 436.
Bills *v.* Nat. Park Bank, 170.
Bing Gee *v.* Ah Jim, 124.
Bingham *v.* Rushing, 250.
Binns *v.* Williams, 416.
Birch *v.* Prodger, 179.
Bird *v.* Perkins, 144.
Birdsong *v.* Birdsong, 276.
Bishop *v.* Fennerty, 19.
v. Young, 198, 203, 366.
Bissell *v.* Briggs, 308, 322, 338.
v. Nooney, 486.
v. Strong, 197.
Bivens *v.* Harper, 222, 236.
v. Matthews, 13, 20, 321.

Bivens et al. *v.* School Directors, 222.
Bixby *v.* Smith, 69.
Black *v.* Black, 204, 598.
v. Brisbin, 77.
v. Clendenin, 390.
v. Scanlan, 94.
Blackly *v.* Matlock, 481.
Blackwood *v.* Jones, 86, 389, 393.
Blake *v.* Bernhard, 93, 94.
v. Hatch, 177.
Blaine *v.* The Charles Carter, 324.
Blair *v.* Cantey, 161, 219, 221, 598.
v. Puryear, 477.
v. Shew, 138, 139, 423.
v. Weaver, 391.
Blaisdell *v.* Ladd, 218, 342.
Blanchard *v.* Brown, 281, 433.
v. Grousset, 418.
Bland *v.* Bowie, 538.
Bledsoe *v.* Wright, 416.
Blevins *v.* Baker, 525.
Bliss *v.* Heasty, 445, 466.
v. Smith, 204, 350.
Blood *v.* Light, 524.
Bloodworth *v.* Hunter, 471.
Bloom *v.* Burdick, 276, 315, 330.
Blossom *v.* Estes, 248, 274.
Blum *v.* Davis, 54, 99, 100.
Boals *v.* Shules, 390.
Board of Education *v.* Scoville, 526.
Boardman *v.* Bickford, 38, 39, 43, 51.
v. Glenn, 27.
v. Roe, 202.
Boatwright *v.* Stewart, 25, 124, 448, 449.
Bobb *v.* Woodward, 275.
Bogart *v.* Dart, 108, 157.
v. Swezy, 274, 322.
Boggs *v.* Bindskoff, 43, 50, 428, 429
Boker *v.* Chapline, 328.
Bolard *v.* Mason, 391.
Bolling *v.* Tate, 451, 453.
Bond *v.* Padelford, 284, 286.
v. Patterson, 96.
v. Ward, 148, 176, 456.
Bonner *v.* Brown, 118, 389, 417.
Boone Co. *v.* Keck, 233.
Booth *v.* Barnum, 495.
v. Estes, 100.
Booth *v.* Rees, 85, 144.
Boothby *v.* Brown, 495.
Borden *v.* Fitch, 308, 312, 322, 330, 336.
Borders *v.* Murphy, 305, 321.
Borum *v.* Reed, 507.
Bosbyshell *v.* Emanuel, 100.
Boscher *v.* Roullier, 417, 427, 433.
Bostwick *v.* Bass, 358.
v. Beach, 514.
Boswell's Lessees *v.* Otis, 272, 315, 330, 335.
Botsford *v.* Simmons, 211, 212, 213, 350.
Bottom *v.* Clarke, 27, 242.
Bounaffon *v.* Thompson, 518.
Boundred *v.* Del Hoyo, 36, 39.
Bourne *v.* Cabot, 211.
v. Hocker, 117, 422, 423.
Bowden *v.* Schatzell, 222.
Bowen *v.* Bank of Medina, 416.
v. First Nat. Bank of Medina, 35.
v. School District, 394.
v. Slocum, 78, 86.
Bower *v.* Fenn, 541.
v. Town, 9, 312, 321, 417, 427.
Bowers *v.* Beck, 58.
v. Ross, 43.
Bowker *v.* Hill, 168.
Box *v.* Lawrence, 17.
Boyce *v.* Tabb, 326.
v. Grundy, 541.
Boyd *v.* Bayless, 218.
v. Beck, 499.
v. Boyd, 398, 420.
v. Brisban, 451, 453.
v. Buckingham, 85, 91, 397.
v. Chesapeake & Ohio Canal Co., 240.
v. Cobbs, 484.
v. Marlin, 445.
v. Urguhart, 335.
Boyer *v.* Clark, 22, 441.
Boyes *v.* Coppinger, 427, 431.
Boyland *v.* Boyland, 270.
Boyle *v.* Franklin Fire Ins. Co., 202.
Boylen *v.* Young, 482.

Boynton *v.* Warren, 154, 314, 322, 553.
Brack *v.* McMahan, 75.
Bozeman *v.* Shaw, 185.
Brace *v.* Benson, 545.
Bradbury *v.* Van Nostrand, 131.
Bradford *v.* Coit, 394.
v. Gillispie, 171.
Bradley *v.* Arnold, 187.
v. Cooper, 63.
v. Hunt, 169.
v. Town of Richmond, 235, 237, 239.
Bradley's Appeal, 139.
Bradstreet *v.* The Neptune Ins. Co., 272, 315.
Brady *v.* Tabor, 214, 387.
Brainard *v.* Bushnell, 258, 486.
v. Shannon, 364.
Braley *v.* Boomer, 407.
Bramfield *v.* Dyer, 543.
Bramhall *v.* Flood, 495.
Branahl *v.* Watson, 522.
Branch *v.* Frank, 80, 425.
Branch Bank *v.* Poe, 203, 239, 394.
v. McDonald, 46.
Brand *v.* United States, 539.
Brandon Iron Co. *v.* Gleason, 489, 491.
Branner *v.* Chapman, 392.
Brash *v.* Wielarsky, 420.
Brashear *v.* West, 59, 293, 597.
Brauser *v.* New Eng. Ins. Co. 247.
Brauson *v.* Shinn, 49, 427, 431, 432, 433.
Bray *v.* Marshall, 268.
v. Saaman, 484, 568.
v. Wallingford, 233, 238.
Brayton *v.* Freeze, 107, 394.
Breading *v.* Seigworth, 564.
Breck *v.* Blair, 400.
Breed *v.* Mitchell, 41.
Breedville *v.* Nicolet, 602.
Brenner, Trucks & Co. *v.* Moyer, 20, 402, 403.
Brewer *v.* Springfield, 272.
v. Tucker, 94, 417, 431.
Bridge *v.* Wyman et al., 287, 288, 448.
Bridge Proprietors *v.* Hoboken Com., 326.
Bridges *v.* North, 202.
v. Perry, 280.
Brien *v.* Pitman, 464.
Brigden *v.* Gill, 196, 202.
Briggs *v.* Block, 196, 213, 222.
v. Gleason, 285.
v. Kouns, 293, 595.
v. Mason, 286.
v. Smith, 25, 118, 422, 447.
v. Taylor, 280.
Brinegar *v.* Griffin, 416, 436.
Brinsfield *v.* Austin, 275.
Brode *v.* Firemen's Ins. Co., 361.
Brolaskey *v.* Landers, 47.
Bromfield *v.* Dyer, 536.
Bromley *v.* Smith, 329.
Bronson *v.* Shinn, 36.
Brooks *v.* Chatham, 167.
v. Cook, 219, 221, 223.
v. Poirier, 120.
v. State, 177.
Brower *v.* Smith, 171.
Brown *v.* Ashbough, 38.
v. Balde, 393.
v. Cook, 284.
v. Cooper, 289.
v. Crenshaw, 94.
v. Davis, 264.
v. Dudley, 560; Dist. Col. 230.
v. Finley, 230.
v. Foster, 213.
v. Frost, 543.
v. Hawkins, 100, 107.
v. Jones, 451, 453.
v. McCluskey, 92.
v. McGehee, 479.
v. Mosely, 552.
v. Neale, 140.
v. Rice's Admr., 541.
v. Richmond, 280.
v. Saratoga R. R. Co., 390.
v. Seymour, 386.
v. Silsby, 216.
v. Somerville, 562.
v. United States, 543.
v. VanBroom, 326.
v. Warren, 367.
v. Whiteford, 116, 117, 421.
v. Williams, 586.

Brownell *v.* Manchester, 281, 284.
Brownfield *v.* Dyer, 270.
Brownwell *v.* Carnley, 159.
Bruce *v.* Cloutman, 305, 322.
v. Coleman, 113, 446.
v. Conyers, 89.
v. Cook, 77, 357.
v. Holden, 177.
v. Pettengill, 256, 280.
v. Stewart, 311.
Brugman *v.* McGuire, 23, 67.
Bruhn *v.* Jefferson Bank, 321, 332.
Bruley *v.* Seaman, 78.
Brumby *v.* Bernard, 400, 401.
Brumgard *v.* Anderson, 432.
Brummell *v.* Hurt, 536.
Brunott *v.* McKee, 552.
Brush *v.* Scribner, 169.
Bryan *v.* Dean, 519.
v. Dunseth, 36.
v. Front, 258.
v. Lashley, 27, 342, 595.
v. Smith, 331.
Bryant *v.* Allen, 16.
v. Hendee, 123, 394.
v. Osgood, 176, 255, 256.
v. Simoneau, 58.
Buckingham *v.* Osborne, 132, 264.
Buckingham *v.* Swezy,
20, 157, 402, 404, 469.
Buchanan *v.* Alexander, 222, 230.
v. Sterling, 102, 323.
Buck *v.* Colbath, 553, 554.
Buckhardt *v.* McClellan,
172, 256, 492.
Buckhurst *v.* Clinkhard, 525.
Buckley *v.* Lowry, 9, 27, 77, 321, 331.
Bucklin *v.* Crampton, 177, 251.
Buckmaster *v.* Smith, 160.
Buddig *v.* Simpson, 194.
Buddington *v.* Stewart, 157.
Budsong *v.* Sledge, 421.
Buffham *v.* Racine, 234, 237.
Buice *v.* Lowman, 394.
Bulfinch *v.* Winchenbach, 206, 491.
Bulkley *v.* Eckert, 222, 233, 236.
Bullard *v.* Wait, 163.
Bullene *v.* Smith, 57.
Bullock *v.* Ferguson, 453.
Bump *v.* Betts, 456.
Bunce *v.* Reed, 274.
Bundrem *v.* Denn, 13, 20, 27, 322,
418, 423.
Bunker *v.* Gilmore, 367.
Bunn *v.* Pritchard, 105.
v. Thompson, 546.
Bunt *v.* Rheum, 22, 443.
Burcalow *v.* Trump, 36, 41.
Burch *v.* Watts, 414.
Burgen *v.* Shaver, 448.
Burgess *v.* Atkins, 525.
v. Clark, 43, 51; Seligman,
Burk *v.* Barnard, 546. [325
Burkhardt *v.* McClellan, 595.
Burkhart *v.* Jennings, 450.
Burnam *v.* Romans, 77.
Burne *v.* Gardner, 113.
Burleson *v.* Milan, 221, 224, 226.
Burlingame *v.* Bell,
161, 219, 292, 295, 595.
Burnell *v.* Hunt, 156.
v. Robinson, 27.
Burnham *v.* Beal, 196.
v. Fond du Lac,
222, 234, 237.
Burnside *v.* McKinley, 195.
Burrell *v.* Letson, 161, 194, 221.
Burroughs *v.* Wright, 161, 219.
Burrows *v.* Miller, 38.
Burrus *v.* Moore, 373.
Burton *v.* District Township, 216.
v. Knapp, 450.
v. Smith, 451.
v. Watson's Case, 505.
v. Wilkinson, 178, 179.
v. Winne, 83, 193, 208.
Bury *v.* Conklin, 394.
Bush *v.* Bush, 394.
Bushey *v.* Raths, 389.
Bushnell *v.* Allen, 353, 354, 360.
v. Com. Ins. Co., 35, 239.
Bussey *v.* Leavitt, 275.
v. Rothschilds, 85, 91.
Butler *v.* Kelsey, 139.
v. Mullen, 367.
v. White, 314, 322, 526.
Butt *v.* Green, 525.
Butterfield *v.* Clemence, 281.

Buzzell *v.* Hardy, 107, 165.
Byers *v.* McClanahan, 398.
Byrd *v.* Hopkins, 251, 423.
Byrne *v.* Roberts, 69.

C.

Cabeen *v.* Douglass, 258.
Cadwell *v.* Colgate, 77.
Cady *v.* Comly, 224.
Cain *v.* Simpson, 309.
Cairo, &c. R. R. Co. *v.* Killenberg, 195, 366, 367, 372, 375, 376.
Caldwell *v.* Arnold, 145, 185.
v. Barclay, 47.
v. Coates, 202, 375, 376.
v. Colgate, 409, 436.
v. Haley, 27.
v. Stewart, 344.
Calhoun *v.* Ware, 315, 320, 323.
Calk *v.* Chiles, 77.
Callaghan *v.* Pocasset Manf. Co., 237.
Callahan *v.* Hallowell, 239, 394.
Callen *v.* Ellison, 329.
Callender *v.* Duncan, 117, 416.
v. Furbish, 212.
Calson *v.* Wilson, 166.
Camberford *v.* Hall, 478.
Cambridge *v.* Charlestown, 39.
Cammon *v.* Tompkins, 430.
Camp *v.* Cahn, 89.
v. Chamberlain, 187.
v. Tibbets, 94.
Campau *v.* Traub, 358.
Campbell *v.* Chamberlain, 22, 442, 449, 450, 451.
v. Hall, 85, 91, 92.
v. McCahan, 330, 333.
v. Moore, 549.
v. Nesbitt, 361, 521.
v. Robert Morris, 252, 319, 431.
v. Ruger, 493.
v. Warner, 57, 58.
v. Whetstone, 425.
Canaday *v.* Detrick, 361, 503, 520, 565.
Canfield *v.* Hard, 469.
Cannon *v.* Dunlap, 506.
Cannon *v.* Logan, 100.
v. McManus, 427, 430.
v. Wood, 331.
Canover *v.* Ruckman, 598.
Capehart *v.* Dowery, 414.
Carey *v.* Gregg, 21.
v. Gunnison, 22, 443, 456.
v. State, 552.
Cariker *v.* Anderson, 321, 331.
Carkin *v.* Babbitt, 165.
Carleton *v.* Ryerson, 172, 256.
v. Washington Ins. Co., 275, 305, 309, 310, 322, 338.
Carlton *v.* Davis, 185.
Carmack *v.* Commonwealth, 552.
Carney *v.* Emmons, 549.
Carpenter *v.* Central Park, &c. R. R. Co., 393.
v. Dresser, 159, 188, 566.
v. Gay, 362.
v. Pridgen, 99.
v. Stevenson, 449.
v. Turrell, 407.
Carr *v.* Farley, 282, 289.
v. Van Holson, 322, 503.
Carrington *v.* Smith, 314.
Carroll *v.* Parkes, 520, Smith, 325.
v. Carroll's Lessee, 32[illegible].
Carter *v.* Champion, 21, 172, 495.
v. Gregory, 477.
v. Jarvis, 157.
v. Willard, 163.
Cartwright *v.* Chabert, 142.
Carver *v.* Shelley, 22, 444.
Case *v.* Beauregard, 60.
v. Moore, 514.
Casey *v.* Adams, 312.
v. Davis, 196, 222, 564.
Cashing *v.* Laird, 377.
Casson *v.* Louis St. Bank, 471.
Catlin *v.* Ricketts, 393.
Cato *v.* Thompson, 541.
Cattle *v.* Am. Screw Co., 522.
Cawthorn *v.* McGraw, 180.
Cedar Hill, &c. Mining Co. *v.* Jacob Little, &c. Mining Co., 389.
Center *v.* McQuestion, 196, 204, 213.
Central Bank *v.* Prentice, 212.
Central Plank Road *v.* Sammons, 244.

Chadbourne *v.* Summer, 177, 264, 314, 322.
Chafee *v.* Fourth Nat. Bank, 155.
Chaine *v.* Wilson, 36.
Chamberford *v.* Hall, 361.
Chamberlain *v.* Beller, 148.
v. Dempsey, 274.
v. Faris, 9, 312, 322.
Chambers *v.* McKee, 361.
v. Sloan, 91.
Chandler *v.* Dyer, 21, 172.
v. Nash, 331, 413.
v. Thurston, 160.
Chapin *v* Ct. R. R. Co., 196.
Chapman *v.* Briggs, 158.
v. City of Brooklyn, 543.
v. Foster, 158.
v. Searle, 163.
v. Williams, 197.
Chappel *v.* Chappel, 548.
Charles *v.* Haskins, 551.
Charnock *v.* Colfax, 288, 314, 322.
Chase *v.* Foster, 415.
v. Hill, 259.
v. Ninth, &c. Bank, 37, 39.
v. North, 375.
Chealy *v.* Brewer, 221, 233, 235.
Cheatham *v.* Trotter, 9.
Chenault *v.* Chapron, 427, 430, 450.
Cheny *v.* Nelson, 418.
Cheongwo *v.* Jones, 562.
Chesapeake R. R. Co. *v.* Paine, 245.
Chesley *v.* Coombs, 367.
Chesney *v.* Francisco, 38.
Chicago *v.* Robbins, 326.
Chicago, &c. R. R. Co. *v.* Ragland, 204, 240, 519.
Childress *v.* Dickens, 203.
v. Fowler, 403, 436.
Childs *v.* Digby, 201, 248.
v. Ham, 257, 262, 281.
Chipella *v.* Launsse, 472.
Chipman's Case, 156; Chittenden's Case, 328.
Chittenden *v.* Hobbs, 420.
Choppin *v.* Wilson, 525.
Christal *v.* Kelly, 393, 410.
Christmas *v.* Biddle, 212, 248.
v. Russell, 336.
Christy *v.* Pridgeon, 326.
Church *v.* Crossman, 389.
v. Knox, 205.
v. Simpson, 375.
Churchell *v.* Fulliam, 119, 123.
Churchill *v.* Abraham, 113, 446, 449, 450.
Churchill *v.* Palmer, 543.
Cincinnati *v.* Bickett, 272.
City Bank *v.* Merritt, 36, 49, 431, 433.
City Bank of New Orleans *v.* McIntyre, 471.
City of Alton *v.* Kirsch, 391.
City of Charleston *v.* Blohme, 541.
City of Chicago *v.* Halsey, 237.
City of Chicago *v.* Rock Island R. R. Co., 330.
City of Erie *v.* Knapp, 237.
City of Lowell *v.* Parker, 551.
City of Newark *v.* Funk, 239.
Claflin *v.* Baere, 94, 436.
v. Iowa City, 240, 250.
v. Lisso, 417.
Clanahan *v.* Brack, 88, 102.
Clanton *v.* Laird, 137, 263.
Clapp *v.* Beardsley, 330.
v. Bell, 581.
v. Graves, 131.
v. Hancock Bank, 217.
v. Thomas, 166.
v. Walker & Davis, 235.
Clark *v.* Arnold, 41, 45.
v. Blackwell, 549.
v. Boggs, 222.
v. Bratt, 275.
v. Brewer, 242.
v. Brott, 22, 25, 27, 323, 449, 453, 483.
v. Bryan, 315, 321, 333.
v. Callaghan, 16.
v. Chapman, 240, 250.
v. Cilley, 213.
v. Foxworthy, 526.
v. Gamwell, 289.
v. Gardner et al. & Trustee, 482.
v. Garther, 77.
v. Gary, 264.
v. Holmes, 276, 315.
v. Lassen Co. Court, 331.

Clark *v.* Likens, 36, 39.
v. Merxsell, 57, 427.
v. Mobile School Commr's, 236.
v. N. J. Steam Nav. Co., 328.
v. Morse, 83.
v. Pratt, 46, 58.
v. Roberts, 77, **419.**
v. Seaton, 56.
v. Smith, 57.
v. Thompson, 321, 330, 331, 333.
v. Viles, 168.
v. Ward, 45.
v. Wilson, 426.
Clary *v.* Haines, 401, 402.
Claussen *v.* Fultz, 27, 92, 323.
Clay *v.* Neilson, 252, 253, 265, **423.**
v. Scott, 493.
Clayburg *v.* Ford, 107.
Claypole *v.* Houston, 77.
Clement *v.* Clement, 203.
Cleneay *v.* The Junction R. R. Co., 267.
Clerk *v.* Withers, 280.
Cleveland *v.* Clap, 591.
Climer *v.* Russell, 557.
Clinton National Bank *v.* Bright, 362, 367, 373.
Close *v.* St. Clair, 167, 525.
Clough *v.* Buck, 208, 517.
Clymer *v.* Willis, 161, 219, 220.
Clymore *v.* Williams, 9, 10, 280, 305, 312, 321, 335.
Cobb *v.* Bishop, 202.
v. Force, 92.
v. Gage, 180.
Coble *v.* Nonemaker, 217, 218.
Coburn *v.* Ansart, 223.
v. Hartford, 203.
Cochrane *v.* Quackenbush, 22, 113, 445.
Cockey *v.* Leister, 222.
v. Milne, 549, 586.
Cockfield *v.* Tourres, 364.
Cockrell *v.* McGraw, 413, 415.
Cockington *v.* Gilbert, 171.
Cockman *v.* Freeman, 497.
Coe *v.* Wilson, 160.
Coffein *v.* Smith, 487.
Coffin *v.* Ray, 167, 495, 502, 509, 524.
Cohen *v.* Burr, 109.
v. Trowbridge, 393.
v. Wauco, 82, 84.
Cohens *v.* Virginia, 326.
Cohn *v.* Justice, 412.
Colby *v.* Coates, 222, 236.
v. Gould, 429, 468.
Cole *v.* Wooster, 222, 489, 491.
Coleman *v.* Waters, 507.
Coleman's Appeal, 8, 308, 312, 322.
Collier *v.* Falk, 393.
Collins *v.* Chase, 155.
Granite Co. *v.* Devereux, 66.
v. Jennings, 520.
v. Perkins, 285.
Colman *v.* Anderson, 275.
v. Bean, 407, 409, 438.
Colston *v.* Berends, 274.
Colt *v.* Ives, 27, 211.
Colwell *v.* Bank of Steubenville, 274.
Commerce Bank *v.* Huntington, 228.
Commercial Bank *v.* Chicago, M. & St. P. R. R. Co., 204, 241.
Commercial Bank *v.* Ullman, 86, 91, 100, 102.
Commercial Bank *v.* Neally, 223.
Commissioners *v.* Watts, 543.
Commonwealth *v.* Greene, 338.
v. Intoxicating Liquors, 560.
v. Matthews, 560.
v. Morse, 284.
v. Stockton, 145, 188.
Comstock *v.* Crawford, 329.
v. Farnham, 565.
Conant *v.* Bicknell, 161, 219, 221.
Congar *v.* Galina, 330.
Congdon *v.* Cooper, 280, 289.
Conklin *v.* Dutcher, 412.
v. Goldsmith, 119.
v. Harris, 127, 156, 421.
Conley *v.* Chilcote, 191.
Connell *v.* Scott, 177.
Connelly *v.* Harrison, 213.
Conner *v.* Commissioners of Rice Co., 432.
Conner *v.* Long, 184, 568.
Conrad *v.* McGee, 77, 100.

Conrad *v.* Prieur, 471.
Conturie *v.* Hastie, 538.
Conway *v.* Armington, 223, 225.
v. Ionia Circuit Judge, 198.
Conwell *v.* Thompson, 470.
Cook *v.* Dillon, 199.
v. Farren, 275.
v. Hopper, 145.
v. Jenkins, 84.
v. Walthall, 202, 239.
v. Whitney, 344.
Cooke *v.* Cooke, 580.
v. Hallett, 197.
v. State National Bank, 35.
Coone *v.* Braun, 212.
Cooney *v.* Moroney, 290.
v. Whitfield, 95.
Cooper *v.* Cooper, 537, 541.
v. Frederick, 77.
v. Hill, 445.
v. McClun, 563.
v. Metzger, 477, 496.
v. Mowry, 280, 289.
v. Newman, 145, 185, 187.
v. Reeves, 417.
v. Reynolds,
8, 13, 317, 320, 325, 326.
v. Smith, 109, 305, 322.
v. Sunderland, 276.
Coosa River St. Bt. Co. *v.* Barclay, 46.
Copeland *v.* Ins. Co., 477.
v. Weld, 168.
Coppel *v.* Smith, 597.
Corbyn *v.* Bollman, 222.
Corcoran *v.* Judson, 451, 453.
Cordaman *v.* Malone, 399, 567.
Corey *v.* Powers, 218.
Cornelius *v.* Davis, 276, 332.
Cornell *v.* Dakin, 407.
Cornman's Appeal, 128.
Cornwell *v.* Hungate, 361, 565.
Corwin *v.* Merritt, 276, 315.
Coston *v.* Paige, 432.
Cota *v.* Ross, 527.
Cottle *v.* Am. Screw Co., 522, 565.
Cotton *v.* Gladding, 40.
v. Huey, 139.
Cottrell *v.* Varnnon, 203.
County of Cass *v.* Johnston, 325.
Countess of Rutland's Case, 4.
Courrier *v.* Cleghorn, 77.
Cousins *v.* Brashier, 25, 118, 447.
Covell *v.* Heyman, 554.
Covert *v.* Clark, 389, 390, 392.
Covington *v.* Cothran, 261.
Coward *v.* Dillinger,
78, 417, 419, 423, 428.
Cowardine *v.* Universal Life Ins. Co., 242.
Cowdry *v.* Walker, 350.
Cowlon *v.* De Lisle, 431.
Cox *v.* Millner, 165.
v. Robinson, 445, 449.
v. Waters, 87, 89.
Crabb *v.* Atwood, 275.
Craddock *v.* Goodwin, 449.
Crafts *v.* Sykes, 545.
Craigmiles *v.* Hayes, 54, 98.
Cramer *v.* White, 468.
Crandall *v.* McKaye, 85.
Crane *v.* Freese, 219, 221, 161, 598.
Crane *v.* Kimmer, 331.
Crary *v.* Barber, 389.
Crawford *v.* Benton, 495.
v. Roberts, 87, 89
Crayne *v.* Wells, 92.
Creagh *v.* Delane, 110.
Creasser *v.* Young, 86, 101.
Creighton *v.* Kerr, 27, 304, 322,
393, 394, 396.
Crisman *v.* Swisher, 262.
Crocker *v.* Clements, 159.
v. Pierce, 165.
v. Radcliffe, 582, 595.
Crone *v.* Braun, 474, 484.
Cronin *v.* Foster, 227.
Cropper *v.* Coburn, 156.
Crosby *v.* Allyn, 172, 174, 255, 256.
Crosby *v.* Hetherington,
133, 172, 174, 255, 256.
Cross *v.* Brown, 280.
v. Elliott, 318.
v. McMaken, 79, 86, 88, 91.
v. U. S., 272, 315.
Crossman *v.* Crossman, 358, 373.
Crouch *v.* Crouch, 105.
Crowell *v.* Galloway, 390, 393.
Crowley *v.* Wallace, 328.

Crowninshield *v.* Strobel, 145, 530, 582, 595.
Croxall *v.* Hutchings, 92.
Cruett *v.* Jenkins, 198, 208.
Crum *v.* Laidlaw, 472.
Cruyt *v.* Phillips, 409.
Culbertson *v.* Cabeen, 98, 99.
Culver *v.* Rumsey, 177.
Cummens *v.* Tovey, 495.
Cumming *v.* Brown, 552.
Cummings *v.* Denny, 127, 421.
v. Fearey, 216.
v. Garvin, 224.
Cuney *v.* Nat. Bank of Augusta, 352, 367, 376, 386.
Cunningham *v.* Gushee, 487; Goelet, *v.* Lamar, 119. [396.
v. Pac. R. R. Co., 329.
Cureton *v.* Dargan, 259, 412.
Curiac *v.* Packard, 398.
Curling *v.* Hyde, 219, 224.
Currens *v.* Ratcliffe, 260, 434.
Curry *v.* Woodward, 356, 423.
Curtis *v.* Alvord, 201.
v. Hoadley, 57.
v. Jackson, 390.
v. Moore, 102.
v. Munday, 495.
v. Norris, 212.
v. Settle, 91.
v. Smith, 229.
Cushing *v.* Hurd, 496, 509, 524.
Cushman *v.* Haynes, 213.
Cutler *v.* Evans, 407.
Cutter *v.* Howe, 289, 314, 322.
Cutter *v.* Richardson, 106, 410, 425.
Cutts *v.* Perkins, 211.
Cushing *v.* Laird, 459.

D.

Daggett *v.* Robins, 557.
Dakin *v.* Anderson 276, 315, 330.
Daley *v.* Cunningham, 222.
Dall *v.* Cooper, 113, 450.
Dalton *v.* Bowker, 453.
Dame *v.* Fales, 183.
Damon *v.* Bryant, 145.
Dana *v.* Adams, 396.
Dandridge *v.* Stevens, 86.
Danforth *v.* Carter, 123.
Danforth *v.* Rupert, 434.
Daniel *v.* Mitchell, 538, 541.
Daniels *v.* Eldridge, 199.
v. Mienhard, 242, 250, 351.
v. Sorrells, 495.
Danielson *v.* Andrews, 140.
D'Arcy *v.* Kitchum, 336, 337, 338, 339.
Darlington *v.* Rogers, 246.
Darrance *v.* Preston, 322, 335, 338.
Darwin *v.* Hatfield, 543.
Davenport *v.* Lacon, 21.
Davenport *v.* Swan, 213.
Daves *v.* Rodier, 158.
Davidson *v.* Chatham Nat. Bank, 567.
v. Donovan, 240.
v. Hackett, 109.
Davis *v.* Blunt, 500.
v. Davis, 223, 493.
v. Drew, 223.
v. Edwards, 92, 99.
v. Eppinger, 480.
v. Fogg, 483; Friedlander, 529.
v. Garrett, 165.
v. Ham, 203.
v. Jones, 276.
v. Mahaney, 598.
v. Marshall, 118, 420, 421.
v. Marston, 199.
v. Miller, 286.
v. Morris, 548.
v. Pawlette, 202.
v. Railroad, 538.
v. Stone, 188, 280, 314, 322.
Dawson *v.* Contee, 464.
v. Holcomb, 161, 218, 220, 598.
v. Jones, 564.
v. Miller, 434.
Day *v.* Bach, 144.
v. Bennett, 103, 430, 433.
v. Kendall, 498; Newark I. R. Co., 328.
Deacon *v.* Oliver, 168.
Deal *v.* Bogue, 525.
Dean *v.* Bailey, 285.
v. Garnet, 423.
v. McGavock, 218.
v. Oppenheimer, 96, 100, 422.
Dearing *v.* Watkins, 499.
Deblieux *v.* Dotard, 223, 226.

De Caussey *v.* Baily, 68.
De Celis *v.* Porter, 524.
Decoster *v.* Livermore, 222.
Degnan *v.* Wheeler, 432.
De Graff *v.* Thompson, 241.
Dehner *v.* Helmbacher Forge, etc., [213.
Deer *v.* Luby, 230.
Delano *v.* Kennedy, 436.
Delby *v.* Tingley, 361, 521.
Delemater *v.* Miller, 139.
Delmas *v.* Ins. Co., 326.
Demeritt *v.* Estes, 387.
Dempsey *v.* Gardner, 163.
Denny *v.* Ward, 548.
v. Warren, 238.
v. Willard, 264, 286.
Denning *v.* Corwin, 330.
Densmore *v.* Matthews, 552.
Dent *v.* Smith, 22, 25, 442, 449, 450, 455, 456.
Denton *v.* Livingston, 168, 264.
Deories *v.* Summit, 105.
Dequindre *v.* Williams, 329.
Derby *v.* Shannon, 478.
Derr *v.* Lubey, 230.
Desha *v.* Baker, 21, 251, 345.
Des Moines and Minn. R. R. Co. *v.* Alley, 312, 392.
Despatch Line *v.* Bellamy Manf. Co. 202, 295.
Detroit Post & Tribune Co. *v.* Reilly, 198.
Deupree *v.* Eisenach, 419.
Devall *v.* Taylor, 99.
De Verdal *v.* Maloone, 499.
Devoe *v.* Brandt, 163.
Devries *v.* Summit, 27, 77, 92, 323.
Dew *v.* Bank of Ala., 354.
Dewey *v.* Garvey, 230.
Dewey *v.* Green, 94.
Dewing *v.* Wentworth, 222.
Dewitt *v.* Oppenheimer, 178.
Dey *v.* Dunham, 500.
Deyo *v.* Jennison, 181.
Dick *v.* Bailey, 281.
Dickey *v.* Fox, 214.
Dickinson *v.* Barnes, 431.
v. Benham, 57, 417, 431, 432.
Dickinson *v.* Hayes, 17.
v. Maynard, 22, 444, 445
v. McGraw, 446.
v. Strong, 168, 197
Dider *v.* Courtney, 430, 450.
Didier *v.* Galloway, 421.
Dierolf *v.* Winterfield, 20, 402, 437.
Dieter *v.* Smith, 204.
Dietrich *v.* Lang, 69.
Dillenback *v.* Jerome, 284.
Dillon *v.* Watkins, 119.
Divine *v.* Harvie, 230, 237.
Dobbins *v.* Hyde, 211, 214, 563.
Dobbs *v.* The Justices, 156.
Dodge *v.* Walley, 524.
Doe *v.* Anderson, 276, 315.
Doe *v.* Routlege, 501.
Dolson *v.* Brown, 213.
Donham *v.* Wild, 280.
Donnell *v.* Jones, 113, 450, 456.
Doolittle *v.* Shelton, 9, 467, 513.
Dorham *v.* Kane, 280.
Dormitzer *v.* Ill. & St. Louis Bridge Co., 312.
Dorr *v.* Clark, 79, 84, 110.
v. Gibboney, 390.
v. Kershaw, 403, 405.
Dorsey *v.* Kyle, 39.
Douglas *v.* Simpson & Trustee, 215.
Douglass *v.* Habestro, 394.
v. Neil, 361.
v. Winslow, 525.
Dove *v.* Martin, 122.
Dow *v.* Cheney, 525.
Dow *v.* Whitman, 274, 275, 276, 323.
Downer *v.* Shaw, 8, 312, 322.
Downing *v.* Phillips, 426.
Downman *v.* Chinn, 399.
Downs *v.* Fuller, 309, 323.
Doyle *v.* Gray, 363.
Drake *v.* Hager, 101.
Drake *v.* Mooney, 253, 262.
Drane *v.* McGavock, 221.
Drew *v.* Alfred Bank, 140.
Drew *v.* Dequindre, 92, 110, 274, 425.
Dressor *v.* McCord, 197.
Driscoll *v.* Hoyt, 367.
Dronillard *v.* Whistler, 69.
Drummond *v.* Stuart, 450.

Dubbs *v.* Hemken, 274.
Dublin *v.* Chadburn, 17.
Dubois *v.* Dubois, 161, 219, 231.
Duchaud *v.* Rousseau, 174.
Dudley *v.* Goodrich, 408.
Dudley *v.* Lamoille County Bank, 284.
Dubois *v.* Glaub, 395.
Duepree *v.* Eisenach, 78.
Duffee *v.* Call, 386.
Duffy & Mehaffy *v.* Lytle, 402, 404.
Duke *v.* R. I. Locomotive Works, 250, 359.
Dukierris *v.* Hallisay, 359.
Dunbam *v.* Waterman, 59.
Duncan *v.* Headley, 49, 156.
Duncan *v.* Wickliffe, 71.
Dunclee *v.* Fales, 177, 314, 322.
Dunlap *v.* Hooper, 204.
Dunlevy *v.* Schwartz, 81, 93.
Dunlop *v.* Patterson Fire Ins. Co., 154, 200, 222, 248.
Dunn *v.* Crocker, 84, 409, 416, 509.
v. Myers, 58, 427.
v. Salter, 50.
Dunnegan *v.* Byers, 203.
Dunning *v.* Humphreys, 448, 449, 450.
Du Puy *v.* Strong, 390.
Durant *v.* Johnson, 494.
Durborrow's Appeal, 156.
Durham *v.* Lisso, 126.
Duringer *v.* Monchino, 530.
Durr *v.* Jackson, 52.
Durrossett's Adm'r *v.* Hale, 274.
Dutton *v.* Simmons, 141, 264.
Dwight *v.* Bank of Mich., 211.
Dwyer *v.* Benedict, 287.
Dyer *v.* Flint, 84, 94.
Dynes *v.* Hoover, 330.
Dynes *v.* Robinson, 431.
Dyson *v.* Baker, 181.
Dunnenbaum *v.* Scram, 99.

E.

Eads *v.* Pitkin, 77.
Ealer *v.* McAllister, 416.
Earl *v.* Bicksford, 543.
v. Camp, 77, 91.
v. Matheney, 518.
v. Spooner, 445.
Early *v.* Doe, 273.
East Line, &c. R. R. Co. *v.* Terry, 374, 375.
Eastman *v.* Avery, 284.
Eaton *v.* Badger, 305, 309, 322, 330, 338.
Eaton *v.* Bartscherer, 445.
Eddy *v.* Brady, 428, 429.
v. Moore, 20, 397.
v. Morse, 402.
v. O'Hara, 204.
Edgarton *v.* Hinchman, 412.
Edgerton *v.* Third Municipality of New Orleans, 237.
Edmundson *v.* DeKalb Co., 237.
Edrington *v.* Allsbrooks, 345.
Edson *v.* Trask, 199.
Edwards *v.* Bodine, 453.
v. Hughes, 414.
v. Prather, 438.
v. Toomer, 315, 320, 323, 331.
v. Transit Co., 242.
Egan *v.* Lumsden, 9, 44, 213, 312, 322.
Eichelberger *v.* Murdock, 196.
Ela *v.* Shepard, 144, 256.
Elam *v.* Barr, 88, 99.
Eldred *v.* Bank, 396.
Eldridge *v.* Lancey, 187.
v. Phillipson, 57, 59.
v. Robinson, 431.
Elizabeth Saving Inst. *v.* Gerber, 599.
Ellicott *v.* Smith, 205.
Ellington *v.* Moore, 36, 39, 43.
Elliott *v.* Jackson, 63, 418.
v. Piersal, 324, 330, 336.
Elliot *v.* Stevens, 123.
Ellis *v.* Goodnow, 560.
Ellis *v.* Tousley, 524.
Ellison *v.* Bernstein, 57.
v. Mounts, 428, 434.
v. Tallon, 89, 432.
v. Tuttle, 168.
Ellsworth *v.* Scott, 400, 413.
Ellwell *v.* Chamberlain, 543.
Elmer *v.* Welch, 196, 204.
Elwyn *v.* Jackson, 472, 473.
Embra *v.* Silliman, 423.

Emerson *v.* Littlefield, 167.
Emerson *v.* Paine, 63.
Emery *v.* Davis, 199.
Emery's Sons *v.* Irving Nat. Bank, 164.
Emmett *v.* Yeigh, 80.
Emory Iron & Coal Co. *v.* Wood, 89.
Endel *v.* Leibrock, 71, 81, 85.
Enders *v.* Richards, 57.
Endress *v.* Ent, 402, 437.
English *v.* Wall, 84.
Ennis *v.* Smith, 17.
Enos *v.* Brown, 285.
Epstein *v.* Salorgne, 9, 10, 12, 20, 265, 402.
Erie *v.* Knapp, 237.
Erskine *v.* Hohnbach, 144.
v. Staley, 21, 294, 488.
v. Stanley, 592.
Erstein *v.* Rothschild, 325, 328.
Erwin *v.* Com. Bank, 77, 419, 420, 445.
Erwin *v.* Ferguson, 115, 127.
Erwin *v.* Heath, 9, 12, 13, 19, 71, 361, 514, 518.
Espey *v.* Heidenheimer, 417.
Estabrook *v.* Earle, 194.
Estbrook *v.* Estbrook, 77.
Estill *v.* Goodloe, 202.
Etheridge *v.* Woodley, 391.
Evans *v.* Andrews, 418.
v. Davis, 264.
v. King, 389, 397, 426.
v. McGlasson, 524.
v. Warner, 52.
Everdell *v.* Sheboygan, &c. R. R. Co., 267, 392, 394.
Everett *v.* Walcott, 215.
Ewing *v.* City of St. Louis, 326.
Excelsior Fork Co. *v.* Lukens, 427.
Exchange Bank *v.* Gulick, 200, 217, 373.
Ex parte Fearle & Lewis, 598.
Ex parte Haynes, 77, 90, 93, 108.
Ex parte R. R. Co., 328, 275, 312, 320, 330.
Ex parte Reed, 552.
Ex parte Robinson, 77, 90, 93, 108.
Ex parte Wilson, 179.
Ezelle *v.* Simpson, 251.

F.

Fairfield *v.* Baldwin, 548.
v. Paine, 258.
v. Payne, 486.
Falls *v.* Weissinger, 280.
Falsom *v.* Haskell, 196.
Fanning *v.* First Nat. Bank, 212.
Fargo *v.* Ames, 498.
Farley *v.* Farior, 83.
Farmers' and Mechanics' Bank *v.* Welles, 351.
Farmers' Bank *v.* Beaston, 219, 261.
Farmers' Bank *v.* Gettinger, 84.
Farmers' etc. National Bank *v.* King, 201, 244.
Farnham *v.* Gilman, 281.
Farnsworth *v.* Childs, 500.
Farr *v.* Newman, 220.
Farrar *v.* Bates, 375.
Farrow *v.* Barker, 38, 43, 44.
Farrow *v.* Olmstead, 16.
Farrington *v.* Edgerley, 288.
Farrington *v.* Sexton, 379.
Farris *v.* The State, 280, 281, 284, 288
Faulk *v.* Smith, 268, 323.
Faulkner *v.* Waters, 203.
Faull *v.* Alaska G & S. M. Co., 250.
Faver *v.* Bank of Ala., 82.
Fay *v.* Sears, 358, 362, 363, 367, 373.
Fay *v.* Smith, 203.
Fayles *v.* Kelso, 333.
Fearey *v.* Cummings, 374, 376.
Feary *v.* Hotchkiss, 152.
Featherston *v.* Compton, 354.
Feazle *v.* Simpson, 456.
Fechheimer *v.* Hays, 71.
Fee *v.* Iron Co., 549.
v. Moore, 477, 496.
v. The State, ex. rel. Pleasant, 394
Fellows *v.* Brown, 63.
v. Dickens, 421.
v. Duncan, 202.
v. Miller, 117, 422.
Fenglin *v.* Cairo & St. Louis R. R. Co., 256, 267
Fenn *v.* Holme, 326.
Feran *v.* Randolphsen, 158.

Ferguson *v.* Baker, 453.
Ferguson *v.* Vance, 314, 321, 403, 408.
Fernald *v.* Chase, 170, 171.
Ferris *v.* Ferris, 63.
Fessenden *v.* Hill, 79, 110.
Fettyplace *v.* Dutch, 280.
Field *v.* Adreon, 50.
v. Crawford, 196.
v. Dortch, 8.
v. Jones, 222.
v. Livermore, 58.
v. McKinney, 522, 564.
v. Park, 139.
Fielding *v.* Lucas, 39.
Fife *v.* Clark, 403, 437.
Fifield *v.* Wooster, 139.
Final *v.* Backus, 545.
Finch *v.* Earl of Winchelsea, 524.
First *v.* Miller, 161, 219, 220.
First National Bank *v.* Hughes, 501, 504.
First Nat. Bank *v.* Redman, 67.
Fish *v.* Field, 202.
v. Fowlie, 173.
v. Keeney, 361.
v. Street, 165, 528.
Fisher *v.* Consequa, 426.
v. Hall, 215.
v. Hood, 418.
v. Lane, 8, 312.
v. McGirr, 559.
v. Marsh, 465.
v. Tallman, 502.
Fisk *v.* Weston, 375.
Fitch *v.* Rogers, 314, 322.
v. Ross, 8, 312, 322, 402.
v. Waite, 43, 49, 50, 145, 169, 492, 582, 595.
v. White, 168.
Fitchett *v.* Dolbee, 224.
Fithian *v.* N. Y. & Erie R. R., 247, 598.
Fitzgerald *v.* Blake, 178.
v. Hollingsworth, 195.
Fitzgerald's Case, 50.
Fitzhugh *v.* Hellen, 172, 256.
Fitzpatrick *v.* Flagg, 451, 453.
Fitzpatrick *v.* Flannagan, 8, 13, 20, 57, 59, 60, 104, 105, 107, 425.
Fitzsimmons *v.* Marks, 8, 10, 312, 322, 335.
Flake *v.* Day, 27.
Flanagan *v.* Cutler, 154, 497, 522, 553.
v. Wood, 283, 311, 322.
Flash *v.* Morris, 372.
v. Paul, 345, 361.
Fleitas *v.* Cockrem, 117, 118.
Fleming *v.* Bailey, 449.
v. Burge, 87.
Fletcher *v.* Fletcher, 168.
v. Harcott, 148.
v. Menken, 400, 569.
Flexner & Lichter, *v.* Dickerson, 105, 323.
Flood *v.* Randall, 23, 66, 141.
Florence *v.* New Orleans Navigation Co., 471, 472.
Florentine *v.* Barton, 329.
Flournay *v.* Lyon, 212.
Flower *v.* Griffith, 88, 97.
Floyd *v.* Black, 276.
v. Hamilton, 450.
Folsom *v.* Connor, 276.
v. Teichner, 413.
Foot *v.* Stevens, 549.
Forbes *v.* Scannell, 59; Hyde, 396.
Force *v.* Brown, 224, 226, 228.
v. Gower, 8, 312, 322.
v. Hubbard, 97.
Ford *v.* Dry Dock Co., 35, 204.
v. Dyer, 145, 185.
v. Hurd, 119, 357, 420, 421.
v. Wilson, 274.
v. Woodward, 25, 118, 357, 447.
Foreman *v.* Carter, 44.
Forrest *v.* O'Donnell, 397.
Forsyth *v.* Warren, 274, 467.
Fortman *v.* Rottier, 436.
Fortune *v.* St. Louis, 237.
Foss *v.* Stuart, 145, 185, 187.
Foster *v.* Dryfus, 509, 510, 513.
v. Dudley, 202.
v. Glazener, 331.
v. Hall, 39, 81, 427, 430.
v. Jones, 77, 361.
v. Mabe, 180.
v. Ropes, 162.
v. Sinkler, 362, 565.

Foster *v.* Sweeney, 449, 450.
v. Walker, 202.
v. White, 564.
Foulks *v.* Pegg, 281.
Fourth School Dist. in Rumford, *v.* Wood, 236.
Fowler *v.* McClelland, 223.
Fowler *v.* Pittsburg, &c. R. R. Co., 214.
Fowler *v.* Williamson, 365.
Fox *v.* Abel, 139.
Foyler *v.* Kelso, 275, 276, 331.
Francis *v.* Nash, 168.
Frank *v.* Chaffe, 22, 449, 453, 483.
v. Frank, 199, 377.
v. Siegel, 164.
Frankel *v.* Stern, 422, 449.
Frankenheimer *v.* Slocum, 71.
Franklin *v.* Claflin, 102.
Fire Ins. Co. *v.* West, 203.
v. Gumersell, 187.
v. Ward, 599.
Free *v.* Hukill, 92.
Freeborn *v.* Glazer, 417.
Freeman *v.* Creech, 106.
v. Grist, 494.
v. Howe, 219, 553, 554.
v. Miller, 193, 265, 353, 519.
v. Thompson, 274, 275, 333.
Frellson *v.* Green, 582.
v. Stewart, 27.
French *v.* Chase, 107.
v. Hoyt, 276, 315.
v. Reel, 555.
v. Sale, 485.
v. Stanley, 264.
v. Wade, 549.
Fridenburg *v.* Pierson, 478.
Friedlander *v.* Myers, 88.
Friedlander *v.* Pollock, 55.
Frost *v.* Bisben, 40.
v. Cook, 119, 120.
v. Shaw, 525.
v. White, 437.
Frothingham *v.* Haley, 203.
Frounstein *v.* Rosenham, 288.
Fulbright *v.* Cannefox, 549.
Fullam *v.* Stearns, 256, 265.
Fuller *v.* Bryan, 41.
Fuller *v.* Hasbrouck, 21, 580.
v. Jewett, 168.
v. Nickerson, 23, 66.
v. O'Brien, 209, 217.
v. Sangford, 334.
Fullerton *v.* Mack, 178.
Fulton *v.* Fulton, 471.
Fulton *v.* Heaton, 144.
Fulweiler *v.* Hughes, 203.
Funkhouser *v.* How, 214, 563.
Furgurson *v.* Gilbert, 478.
Furman *v.* Walter, 71, 412, 427, 431, 433.

G.

Gable *v.* Brooks, 119.
Gaddis *v.* Lord, 450.
Gager *v.* Watson, 598.
Gaines *v.* Bierne, 514.
Gaines *v.* Paige, 482.
Gaither *v.* Bellew, 222.
Gale *v.* Ward, 177.
Galena & Southern Wisconsin R. R. Co. *v.* Stahl, 168.
Gall *v.* Hinton, 157, 165.
Gallagher *v.* Cogswell, 116, 421, 422.
Galloway *v.* Bird, 263.
Galloway *v.* Holmes, 79, 88.
Gallup *v.* Robinson, 183.
Garcia & Leon *v.* La. Mut. Ins. Co., 373.
Gardner *v.* Hust, 548.
v. Lane, 538.
v. The Mayor, 538, 542, 543.
Garity *v.* Gizie, 355.
Garner *v.* Burleson, 98, 99.
v. Campbell, 558.
v. Johnson, 428.
v. Van Alstine, 546.
v. White, 81, 93.
Garnet *v.* Macon, 538, 541, 542.
v. Wimp, 144.
Garrett *v.* Logan, 453.
v. Tirmen, 427, 429.
Garvin *v.* Paul, 156.
Gary *v.* McCown, 256.
v. May, 275.
Gasherier *v.* Apple, 58, 417, 431.

Gasquet *v.* Collins, 422.
Gass *v.* Williams, 409, 436, 509, 510, 513.
Gassett *v.* Grout, 223.
Gates *v.* Bennett, 67.
v. Bushnell, 492, 582, 595.
v. Flint, 177.
v. Gates, 281.
v. Kerby, 214.
Gaudy *v.* Hall, 330.
Gay *v.* Alter, 538.
v. Eaton, 302, 321, 412.
v. Johnson, 601.
Gee *v.* Warwick, 223.
Geer *v.* Chapel, 202.
Geer *v.* Putnam, 139.
Gelpcke *v.* Dubuque, 326.
Gelstrop *v.* Moore, 276.
Gemmel *v.* Rice, 69, 549.
Genin *v.* Tompkins, 431, 433.
George *v.* Bassett, 165, 212.
George *v.* Ralls Co., 234.
Gerber *v.* Ackley, 552.
Germain *v.* Steam Tug Indiana, 558.
German Bank *v.* Dash, 56.
Gerson *v.* Jamar, 481.
Gery *v.* Ehrgood, 212.
Getchell *v.* Chase, 202, 217, 376.
Gibbon *v.* Bryan, 355.
Gibbons *v.* Cherry, 353.
Gibbs *v.* Chase, 145, 263, 281.
v. Queen Ins. Co., 247, 249.
v. Shaw, 276, 315.
Gibson *v.* Jenney, 145, 185, 187.
v. McLaughlin, 51, 431.
v. Roll, 330.
v. Wilson, 251, 405, 485.
Giddings *v.* Coleman, 210.
Gilbert *v.* Anthony, 398.
v. Crandall, 280, 284.
v. Hollinger, 181, 432.
Gilchrist *v.* West Virginia Oil and Oil Land Co., 533.
Gile *v.* Devens, 141.
Giles *v.* Ash, 213.
Gilkesen *v.* Knight, 83.
Gill *v.* Downs, 418.
Gill *v.* Wyatt, 51.
Gillett *v.* Needham, 276, 315.
Gilliland *v.* Cullem, 269.
Gillispie *v.* Clark, 20, 403, 437.
Gillispie *v.* Commercial Mutual Marine Ins. Co., 277, 304.
Gilman *v.* Gilman, 340.
v. Hill, 185.
v. Ill. & Miss. Tel. Co., 527.
v. Wheelock, 485.
Gilmore *v.* Carnahan, 527.
Gilmore *v.* N. Am. Land Co., 525.
Girard Fire Ins. Co. *v.* Field, 203.
Girard Life Ins. Co. *v.* Field, 28.
Givan *v.* McCarroll, 315.
Glenn *v.* Gill, 222.
Godbold *v.* Bass, 223.
Goddard *v.* Cunningham, 120.
Godfrey *v.* Macomber, 241.
Goebel *v.* Stephenson, 401.
Goldsmith *v.* Stetson, 135.
Goldsticker *v.* Stetson, 427, 428.
Golson *v.* Powell, 212, 215, 484.
Goode *v.* Longmire, 180, 187.
Goodhue *v.* King, 407, 505.
Goodman *v.* Niblack, 273.
Goodrich *v.* Church, 281, 290.
Goodwin *v.* Richardson, 509, 524.
Goore *v.* McDaniel, 21.
Gordan *v.* McCurdy, 483.
Gordon *v.* Baillie, 27.
v. Gaffey, 63.
v. Jenney, 281, 288.
v. Johnston, 397.
v. Webb, 591.
Gore *v.* Clisby, 197.
Gore *v.* Mastin, 144.
Gorman *v.* Swaggerty, 344.
Goss *v.* Boulder Co. Com'rs, 61.
Goss *v.* Gowing, 100.
Goudy *v.* Hall, 330, 333.
Gould *v.* Meyer, 356, 517.
Goulding *v.* Hair, 154, 497, 553,
Gove *v.* Varrell, 197.
Gover *v.* Barnes, 427, 431.
Governor *v.* Hancock, 552.
Gowan *v.* Hanson, 74.
Gower *v.* Emery, 148, 184, 264.
Gower *v.* Stephens, 288, 322, 314.
Grace *v.* Rittenberry, 27.

Graham *v.* Burckhalter, 27, 116, 118,
v. Spencer, 396. [421.
v. De Lanney, 77.
v. Moore, 202.
v. Ruff, 86, 91, 95.
Graigle *v.* Notnagel, 181.
Grand Gulf R. R. & Banking Co. *v.* Conger, 82, 120.
Grangers' Ins. Co. *v.* Turner, 62, 323.
Grant *v.* Denel, 113.
v. Hawding, 597.
v. Lloyd, 538.
v. Shaw, 168, 203, 212.
Graves *v.* Cole, 105, 425.
Gray *v.* Del. & Hud. Canal Co., 361, 522.
v. McNeal, 330.
v. Perkins, 397.
Gray's Administrator *v.* Patton's Administrator, 499.
Grayson *v.* Veeche, 218.
Greely *v.* Reading, 21, 499.
Green *v.* Hill, 9, 312, 322.
v. Neal's Lessee, 326.
v. Pyne, 156, 276, 424.
Greene *v.* Beckwith, 36, 38, 41.
v. Greene, 39, 159.
v. Tripp, 94, 345, 355, 517.
Greenfield *v.* Wilson, 552.
Greenleaf *v.* Perrin, 202, 376.
Greenman *v.* Fox, 503, 560.
Greentree *v.* Rosenstock, 367, 564.
Greenwault *v.* Farmer's Bank, 77, 79, 135, 227, 276, 315, 423.
Greenway *v.* Mead, 77.
Greenwell *v.* Greenwell, 393.
Greer *v.* Higgins, 502.
Greer *v.* Rowley, 237, 240, 250.
Gregg *v.* Nilson, 27.
Gregg *v.* Thompson, 328, 332.
Gregory *v.* Higgins, 206.
Greiner *v.* Prendergast, 63.
Grewell *v.* Henderson, 275.
Grey *v.* Young, 416.
Gribbon *v.* Freel, 131, 184.
Grieff *v.* Betterton, 178.
Griffin *v.* Helmbold, 221.
Griffith *v.* Smith, 184.
Grignon *v.* Astor, 324, 330.
Grigsley *v.* Love, 492, 597.
Grinnell *v.* Phillips, 551.
Griswold *v.* Sharpe, 63, 418.
Groat *v.* Gillispie, 448.
Groome *v.* Lewis, 222.
Grosvenor *v.* Bank, 168, 169.
Grover *v.* Buck, 89, 282.
Grubbs *v.* Colter, 20, 321.
Guerin *v.* Hunt, 135.
Guild *v.* Holbrook, 203.
Guile *v.* McNanny, 99.
Guise *v.* O'Daniel, 40.
Gunn *v.* Howell, 356, 361, 560, 562.
v. Mason, 276, 332.
Gutman *v.* Va. Iron Wokrs Co., 88, 102.
Gutterson *v.* Morse, 215.
Guy *v.* Pierson, 276.

H.

Haas *v.* Shaw, 525.
Haber *v.* Nasitts, 58.
Habich *v.* Folger, 396.
Hacker *v.* Stevens, 342, 582, 597.
Hackettstown Bank *v.* Mitchell, 39, 159.
Hackley *v.* Kanitz, 367, 374.
Hackley's Exr. *v.* Swigert, 536.
Hadley *v.* Peabody, 236, 237.
Hafley *v.* Patterson, 88, 102.
Hagan *v.* Burch, 423.
v. Lucas, 509.
Hagedon *v.* Bank of Wisconsin, 222.
Hagerstown Bank *v.* Weckler, 204
Haggart *v.* Morgan, 36, 39, 40.
Haggerty *v.* Wilber, 179, 180, 187.
Hagood *v.* Hunter, 99, 100.
Hahn *v.* Kelly, 271.
Haiglette *v.* Leake, 53.
Hakes *v.* Shupe, 322, 335, 338, 513
Halbert *v.* Stinson, 597.
Haldeman *v.* Hillsborough & Cin. R. R. Co., 582.
Hale *v.* Chandler, 77, 79, 87, 480.
v. Cummings, 581.
v. The City of New Orleans, 453.
Halett *v.* Nugent, 394.

Hall *v.* Brazelton, 105, 107, 416.
v. Brooks, 291.
v. Filter Manf. Co., 243.
v. Gould, 500.
v. Grogan, 129.
v. Howd, 330.
v. Page, 212.
v. Palmer, 394.
v. Walbridge, 491.
v. Williams, 200.
Halland *v.* Smit, 522.
Hallett *v.* Righters, 270.
Halley *v.* Jackson, 106.
Hallock *v.* Belcher, 450.
Halpin *v.* Barringer, 196.
Halpine *v.* Hall, 184.
Halsey *v.* Fairbanks, 165.
Hamble *v.* Owen, 117.
Hamilton *v.* Bryant, 407.
v. Burum, 331.
v. Knight, 92, 156.
Hammett *v.* Morris, 386, 527.
Hamnill *v.* Phenicie, 117.
Hancock *v.* Colyer, 203, 492.
v. Henderson, 171, 256.
Handy *v.* Brong, 63.
v. Dobbin, 165, 168.
v. Ins. Co., 391.
Hanna *v.* Bry, 222.
v. Guy, 536.
v. Lauring, 361.
v. Loring, 63.
Hannahs *v.* Felt, 586.
Hannibal & St. Jo. R. R. Co. *v.* Crane, 28.
Hanover *v.* Turner, 39.
Hansen *v.* Butler, 223.
Hanson *v.* Dow, 136, 137, 423.
Haralson *v.* Newton, 55, 98, 323.
Harbinson *v.* McCartney, 161, 219.
Hardcastle *v.* Hickman, 509.
Hardeman *v.* Morgan, 22, 441, 443.
Hardesty *v.* Campbell, 428, 431.
Harding *v.* Larkin, 453.
Hardy *v.* Trabue, 100.
Hargadine *v.* Van Horn, 77, 84, 92, 103.
Harger *v.* Spofford, 22, 444.
Haris *v.* Trapp, 420.
Harkness *v.* Hyde, 390.
Harlow *v.* Becktle, 274.
Harmen *v.* Tappenden, 457.
Harmon *v.* Birchard, 354, 562.
Harnden *v.* Gould, 158.
Harper *v.* Bell, 402, 437.
v. Commercial, &c. Bank, 481
v. Scudder, 417.
Harrell *v.* Whitman, 202.
Harriman *v.* Gray, 281.
Harrington *v.* Loomis, 69.
Harris *v.* Capell, 57.
v. Grodner, 269, 274.
v. Gwin, 19.
v. Hanson, 145, 188.
v. Hardeman, 8, 308, 312, 319, 320, 331, 336, 392.
v. Linnard, 426.
v. Phœnix Ins. Co., 216.
v. Somerset & Ken. R. R. Co., 240
v. Taylor, 427, 430.
Harrison *v.* King, 81, 417.
v. Pender, 477.
v. Trader, 21.
Hart *v.* Anthony, 227.
v. Chalker, 495.
v. Smith, 393.
v. Swayne, 538, 541.
Hartford Quarry Co. *v.* Pendleton, 408.
Hartle *v.* Long, 224.
Hartman *v.* Olvera, 196, 204, 526.
Harvard College *v.* Gore, 39, 40.
Harvey *v.* Huggins, 331.
Haskell *v.* Bartlett, 274.
v. Haskell, 199.
Hastings *v.* Phœnix, 430.
Hatch *v.* Bailey, 160.
v. Fowler, 282.
v. Lincoln, 160.
v. Smith, 591.
Hathaway *v.* Davis, 425.
v. Laribee, 172, 256, 262.
v. Russell, 367.
Hatry *v.* Shuman, 427, 430.
Haust *v.* Burgess, 196, 199.
Haven *v.* Low, 159, 212.

Haven *v.* Wentworth, 202, 376.
Havis *v.* Taylor, 43, 51.
v. Trapp, 427.
Hawes *v.* Waltham, 206.
Hawkins *v.* Albright, 427.
v. Ga. Bank. 384.
v. Graham, 386.
Hawley *v.* Atherton, 205.
v. County of Litchfield, 234.
v. Delmas, 98, 99.
v. Mead, 276.
Hawthorne *v.* St. Louis, 237.
Hayden *v.* Sample, 448, 450, 451, 452.
Haydon *v.* Bank of Wis., 222.
Hayes *v.* Gillispie, 258.
Haynes *v.* Gates, 561.
v. Knowles, 156, 261.
v. Morgan, 284.
v. Powell, 44.
v. Small, 256, 264, 567.
Hays *v.* Anderson, 368.
v. Lycoming Fire Ins Co., 250.
Hayward *v.* George, 154, 553.
Haywood *v.* Collins, 27, 275, 276, 321, 330, 331, 333.
v. Cunningham, 23, 66.
v. McCrory, 275, 276, 321, 333, 334.
v. Russell, 274.
Hazelrigg *v.* Donaldson, 402, 437, 438.
Hazzard *v.* Agricultural Bank, 35.
Head *v.* Merrill, 239, 3 9, 394.
Heagle *v.* Wheeland, 557.
Hearn *v.* Adamson, 356.
v. Crutcher, 199, 221.
v. Foster, 213.
Hearne *v.* Keath, 202.
Heas *v.* Shaw, 525.
Heath *v.* Keyes, 145.
v. Lent, 448.
Hebel *v.* Amazon Ins. Co., 193, 237, 265.
Hecht *v.* Green, 210.
Heffernan *v.* Grymes, 361.
Heffner *v.* Gunz, 389, 392.
Heibner *v.* Chave, 238.
Heidenback *v.* Schland, 37.
Hellman *v.* Fowler, 93, 428, 451.
Helm *v.* Gray, 485.
Helmer *v.* Rehm, 530.
Heminway *v.* Saxton et al., 179.
Hemmenway *v.* Pratt, 202.
Hemmenway *v.* Wheeler, 177, 280, 314.
Hemshein *v.* Levy, 321.
Henderson *v.* Bliss, 477.
v. Drace, 127, 421, 425, 430.
v. Hamer, 19.
v. Overton, 543.
v. Travis, 432.
Hendrick *v.* Cleveland, 330.
Hennen *v.* Forget, 370.
Henrie *v.* Sweazy, 88, 309, 310, 312, 321.
Henry *v.* Gold Park Mining Co., 402, 406.
v. Mitchell, 172, 256.
v. Quackenbush, 159, 180, 187
Herbert *v.* Hanrick, 17.
Herbert's Heirs *v.* Babin, 471.
Herdon *v.* Forney, 446.
Hergman *v.* Dettlebach, 171.
Hermann *v.* Amedee, 412, 433.
Herndon *v.* Pickard, 173.
Hernsheim *v.* Levy, 56, 432.
Herring *v.* Hoppock, 181.
Hershfield *v.* Claflin, 506, 525.
Hershy *v.* Clarksville Institute, 481.
Hess *v.* Bower, 94.
v. Shorb, 223.
Hewes *v.* Cooper, 398.
v. Parkman, 187.
Hewey *v.* Champion, 21.
Hewitt *v.* Wagar Lumber Co., 241, 358, 375.
Hewitt *v.* Wheeler, 200.
Hewson *v.* Tootle, 483.
Heyn *v.* Farrar, 417.
Hiatt *v.* Bullene, 502.
Hibbard *v.* Clark, 235.
Hichins *v.* Lyon, 467.
Hickey's Lessee *v.* Stewart, 336, 338.
Hicks *v.* Chapman, 224.
v. Gleason, 342, 592.
Hickman *v.* Flenoriken, 99.
Hickok *v.* Buell, 495.

Higdon *v.* Vaughan, 401.
Higgins *v.* Grace, 439, 512.
High *v.* Wilson, 145.
Hightower *v.* Slaton, 236.
Hildreth *v.* Fitts, 185.
Hill *v.* Baker, 581.
v. Beach, 221, 599.
v. Bond, 94, 417.
v. Child, 494.
v. Culan, 433.
v. Cunningham, 417, 428.
v. Figley, 144.
v. Foison, 275.
v. Harding, 20, 402, 404.
v. Hunnewell, 106, 410.
v. La Crosse & M. R. Ry. Co., 220, 234.
v. Pride, 331.
v. Seales, 398.
v. Whitney, 63, 432.
Hiller *v.* Lampkin, 319, 464.
Hills *v.* Moore, 20, 98, 105, 402, 404, 433.
Hilton *v.* Ross, 80, 91, 322, 397.
Hinds *v.* Fagebank, 53, 100.
v. Miller, 267, 514.
Hine *v.* Dodd, 501.
Hines *v.* Chambers, 27, 144, 322.
v. Kimball, 483.
Hinman *v.* Rushmore, 334.
Hinsdill *v.* Safford, 206.
Hirsch *v.* Hutchinson, 58.
Hirsh Brothers *v.* Thurber, 69, 137.
Hirth *v.* Pfeifle, 205, 362.
Hisler *v.* Carr, 420.
Hitchcock *v.* Aicken, 338.
v. Egerton, 168.
v. Giddings, 538, 542.
v. Holmes, 181.
v. Miller, 198.
Hite *v.* Fisher, 267.
Hitchman *v.* Garrard, 83, 103.
Hoag *v.* Hoag, 218, 224.
Hoagg *v.* Howard, 21, 501, 524.
Hoar *v.* Marshall, 224.
Hobbs *v.* Carr, 162.
Hobson *v.* Emporium Real Estate & Manf. Co., 9, 310, 312, 321, 467.
Hodo *v.* Benecke, 67.
Hodge *v.* Norton, 409.
Hodges *v.* Baneham, 17.
Hodson *v.* Tootle, 433.
Hoffman *v.* Fitzwilliams, 350.
v. Simon, 514.
v. Wetherell, 221, 222, 223.
Hoffner *v.* Gunz, 322.
Hoge *v.* Norton, 436.
Hoggett *v.* Emerson, 41.
Hogtaling *v.* Osborn, 139.
Hoisington *v.* Armstrong, 166.
Holbrook *v.* Baker, 213.
v. Waters, 224.
Holcomb *v.* Foxworth, 446.
Holland *v.* Pettit, 506.
v. Smith, 207, 522, 564.
Holliday *v.* Cohen, 55.
Holliday *v.* Ward, 17.
Holliman *v.* Carroll, 551.
Hollingsworth *v.* Barbour, 271, 272, 315.
Hollister *v.* Goodall, 181.
Holloway *v.* Herryford, 417.
Holman *v.* Fisher, 19, 221.
Holmes *v.* Barclay, 63.
v. Cooper, 512.
v. Russell, 131.
v. Weaver, 453.
Holstein Manf. Co. *v.* Lea, 88, 97.
Holton *v.* South Pac. R. R. Co., 374.
Holyoke *v.* Adams, 407.
Homan *v.* Brinckerhoff, 118, 409, 421, 436.
Home Mutual Ins. Co. *v.* Gamble, 561.
Hoot *v.* Spade, 453.
Hooton *v.* Gamage, 560.
Hopkins *v.* Nichols, 98, 99, 100.
Hopkirk *v.* Bridges, 27, 305, 323, 330.
Hopper *v.* Fisher, 276.
Hopson *v.* Dinan, 198.
Horn *v.* Bayard, 449.
v. Cole, 167.
Horton *v.* Beckman, 133.
v. Grant, 199.
Hoskins *v.* Johnson, 205.
Hotchkins *v.* McVicker, 281.
Houghton *v.* Ault, 36.
v. Davenport, 160.

Houghton *v.* Lee, 241.
House *v.* Balt. & O. R. R. Co., 203.
v. Hamilton, 50, 428. 429.
Houseman *v.* Cargo of the Schooner North Carolina, 405.
Houston *v.* Belcher, 118.
v. McCluney, 18.
v. Wolcott, 361.
How *v.* Field, 197.
Howard *v.* Clark, 492.
v. Daniels, 172, 255.
v. McLaughlin, 522, 564.
v. North, 538.
v. Oppenheimer, 100, 422.
v. Whittemore, 280.
v. Williams, 145, 185, 187.
Howell *v.* Freeman, 597.
v. Kingsbury, 93, 95.
Howes *v.* Spicer, 178, 566.
v. Waltham, 491.
Howland *v.* Spencer, 168.
Hoyt *v.* Christie, 224, 225.
v. Robinson, 206, 491.
v. Swift, 202, 376.
Hozeman *v.* Rose, 77.
Hubbard *v.* Savage, 495.
Hubbardstown Lumber Co. *v.* Covert, 79.
Hucherson *v.* Ross, 420.
Hudgens *v.* Hudgens, 538.
Hudson *v.* Hunt, 205.
Huff *v.* Hutchinson, 437.
Hugg *v.* Booth, 202.
Hughes *v.* Brooks, 448.
v. Martin, 102.
v. Sprague, 214.
v. Stinnett, 102, 420.
v. Tennison, 404.
Hull *v.* Blake, 355.
Huls *v.* Buntin, 333.
Hume *v.* Conduitt, 560.
Humphrey *v.* Wood, 27.
Humphreys *v.* Pratt, 148, 264.
Hunt *v.* Coon, 375.
v. Ely, 206.
v. Hapgood, 330.
v. Hunt, 39, 159.
v. Johnson, 305, 328, 338.
v. Norris, 9.
Hunt *v.* Stevens, 219, 222.
v. Strew, 94.
v. Wickliffe, 274.
Hunter *v.* Brown, 401.
v. Martin, 524.
v. Peaks, 102, 186.
Huntington *v.* Blaisdell, 177, 281.
v. Risden, 199, 209.
Huntley *v.* Stone, 196, 222.
Hurlburt *v.* Hicks, 221, 599.
Hurst *v.* Hurst, 524.
Hurt *v.* Redd, 21, 495.
Huswell *v.* Parsons, 525.
Hutchins *v.* Evans, 206.
v. Hawley, 202, 376.
Hutchinson *v.* Lamb, 63.
Huxley *v.* Harrold, 496, 507.
Hyde *v.* Nelson, 432.
Hynson *v.* Taylor, 63.

I.

Ide *v.* Fassett, 280.
Ide *v.* Harwood, 170.
Ill. Cent. R. R. *v.* Cobb, 242.
Ilsley *v.* Nichols et al., 179.
Inbusch *v.* Farwell, 601.
Ingalls *v.* Herrick, 162, 163.
Ingersoll *v.* Mongam, 538, 542.
Ingle *v.* McCurry, 18, 278.
Inhabitants of Turner *v.* Buchfield, 40
Ind. & St. L. Ry. Co. *v.* Horst, 328.
Inman *v.* Stratton, 402, 437.
In re Alex. Thompson, 36, 39, 40, 44.
Bellows, 16.
Bliss, 77.
Faulkner, 77, 108.
Glen Iron Works, 245.
Griswold, 477.
Hollingshead, 87.
Ins. Co. of North America *v.* Swineford, 391.
Insler *v.* Lane, 159, 162.
Ireland *v.* Webber, 512.
Irvin *v.* Howard, 20, 87, 100, 103, 127, 403, 416, 421.
Isaacs *v.* Edwards, 427, 430.
Isham *v.* Ketchum, 413, 477.
Ivens *v.* Ivens, 368.

Ives *v.* Bartholomew, 456.
v. Curtis, 50.
v. Vanscoyoc, 203.

Jackman *v.* Anderson, 512.
Jackson *v.* Babcock, 330.
v. Bank of U. S., 8, 199.
v. Burgott, 500.
v. Burke, 53, 85.
v. Chamberlain, 501, 524.
v. Cornell, 59.
v. Esty, 330.
v. Given, 501.
v. Perry, 36.
v. Post, 501.
v. Sharp, 500.
v. Shipman, 82.
v. Sprague, 273.
v. Stanley, 120, 127, 421.
v. Warwick, 117, 118, 421.
v. Willard, 168.
Jackson's Appeal, 470.
Jacob *v.* U. S., 99.
Jacobs *v.* Hogan, 83, 477.
Jacoby *v.* Gogell, 63, 87.
Jaeger *v.* Stelling, 399, 509.
Jaffrey *v.* Purtell, 512.
James *v.* Dowell, 95, 426, 429.
v. Stratton, 525.
Jaquett *v.* Palmer, 221.
Jarvis *v.* Barrett, 416.
Jasper County *v.* Chenault, 127, 421.
Jaycox *v.* Chapman, 118, 410, 438.
Jefferson County *v.* Swain, 156.
Jeffray's Appeal, 342.
Jeffries *v.* Harvie, 251.
Jemel *v.* Howe, 50.
Jenkins *v.* Lemonds, 552.
v. Lester, 229.
Jenks *v.* Osceola Township, 235, 237.
Jenners *v.* Doe, 59.
Jenness *v.* Wendell, 162.
Jenney *v.* Delesdernier, 281.
Jennings *v.* Joiner, 446.
Jewel *v.* Howe, 99, 419.
Jewell *v.* Mills, 552.
Jeter *v.* Hewitt, 326.
Jewett *v.* Bacon, 205.
Johns *v.* Church, 185.
Johnson *v.* Bell, 497.
v. Buell, 389.
v. Clark, 502.
v. Day, 138.
v. Delbridge, 385.
v. De Witt, 413, 416.
v. Dexter, 214, 235, 387.
v. Dodge, 513.
v. Edson, 280, 581.
v. Evans, 525.
v. Farmers Bank, 448.
v. Gorham, 342, 593.
v. Griffith, 489, 597.
v. Hale, 100.
v. Hannah,
27, 77, 103, 275, 323.
v. Hersey, 241.
v. Holley, 507.
v. Huntington, 545.
v. Johnson,
305, 309, 321, 330, 334.
v. Laughlin, 53.
v. Layton, 275, 333.
v. Lowry, 49.
v. McAllister's Assignee, 59.
v. McCutchings, 354.
v. Moss, 252, 253.
v. Pace, 236.
v. Sharp, 504.
v. Thweatt, 59.
Johnston *v.* Fellerman, 548.
Johnston *v.* Field, 57.
Joice *v.* Poydras De La Lande, 471.
Jolland *v.* Stainbridge, 501.
Jones *v.* Anderson, 118, 119, 421.
v. Andrews, 396.
v. Bank of Northern Liberties,
v. Byrd, 390. [201.
v. Crews,
194, 196, 197, 202, 203.
v. Doles, 451, 452.
v. Etna Ins. Co., 196.
v. Gorham, 223.
v. Gresham, 8.
v. Hart, 507.
v. Haward, 460.
v. Hunter, 19.

Jones *v.* Jones, 161, 219, 333, 397, 509, 600.
v. Miller, 545.
v. N. Y. & Erie R. R. Co., 247, 344.
v. Norris, 168.
et al. *v.* Peasly, 402.
v. Pope, 77.
v. Winchester, 227.
v. Witter, 565.
Jordan *v.* Hazard, 418.
Judah *v.* Stephenson, 305, 322.
Judd *v.* Fox, 558.
Judson *v.* Lake, 17.

K.

Kalm *v.* Herman, 102, 422.
Kane *v.* Clough, 358.
Kanouse *v.* Dermedy, 409.
Kansas City, St. Jo. & C. B. R. R. Co. *v.* Campbell, 329.
Karnes *v.* Pritchard, 375.
Katz *v.* Sorsby, 203.
Kauffman *v.* Jacobs, 208, 365.
Kearney *v.* McCullough, 416.
Keating *v.* Spink, 272, 315.
Keeler *v* Keeler, 391.
v. Wood, 453.
Kegel *v.* Schrenkheisen, 98, 99, 100.
Keigher *v.* McCormick, 108.
Keith *v.* Harris, 597.
v. Levi, 344.
v. Stetter, 90, 322, 433.
Kelley *v.* Strayer, 71.
v. Whiting, 484.
Kellogg *v.* Carrico, 272.
v. Freeman, 361, 514, 521.
v. Miller, 420, 428, 429.
Kelly *v.* Archer, 420.
v. Babcock, 196.
v. Beauchamp, 451.
v. Board of Public Works, 600.
v. Dexter, 285.
v. Dill, 166.
v. McMinniman, 223.
v. Roberts, 196, 213.
v. Weymouth, 376.
Kelsey *v.* Kendall, 499.
Kempe's Lessee *v.* Kennedy, 329, 330.
Kendall *v.* Brown, 403, 417, 433, 436, 438.
v. Irvine, 259.
v. Morse, 200.
v. White, 264.
Kennedy *v.* Aldridge, 223.
v. Baillie, 38, 58, 548.
v. Brent, 183, 342, 582, 597.
v. Dillon, 77.
v. H. L. & S. Society, 240, [250.
v. Meacham, 455.
v. Morrison, 102, 403, 437.
v. Pike, 257.
Kennon *v.* Evans, 86, 91.
v. Ficklin, 493.
Kenrick *v.* Huff, 507.
Kergin *v.* Dawson, 212.
Kerr *v.* Hitt, 272.
v. Mount, 71.
v. Smith, 77.
Kerry *v.* Bower, 597.
Kessey *v.* McHenry, 495.
Ketchum *v.* Ketchum, 413.
v. Vidvard, 52.
Kettle *v.* Harvey, 202.
Keyser *v.* Mitchell, 200, 294.
v. Rice, 238, 239.
Kibbe *v.* Kibbe, 338.
Kidder *v.* Hadley, 276.
v. Packard, 206.
Kiefer *v.* Webster, 89.
Kilbourne *v.* Woodworth, 8, 10, 308, 312, 322.
Kilcrease *v.* Blythe, 276, 332.
Kimball, &c. Man. Co. *v.* Vroman, 545.
Kimball *v.* Macomber, 198, 357.
v. Plant, 206.
Kimbrough *v.* Davis, 564.
Kincaid *v.* Neal, 413, 478.
King *v.* Bucks, 173, 252, 253.
v. Cooper, 58.
v. Harrington, 69, 275, 315, 320, 321, 331, 333, 335.
v. Hubbell, 146, 158.
v. Moore, 221, 599.
v. Thompson, 69, 85.

King *v.* Vance, 9, 10, 203, 311, 565.
Kingman *v.* Perkins, 362.
Kingsland *v.* Cowman, 93.
v. Worsham, 43, 45.
Kingsley *v.* Mo. Fire Co., 205.
Kinsey *v.* Wallace, 22, 444.
Kipp *v.* Fullerton, 549.
Kirby *v.* Schoonmaker, 59.
Kirk *v.* Morris, 397, 509.
Kirkman *v.* Patton, 427, 428.
Kirksey *v.* Bates, 252.
v. Dubose, 144.
v. Fike, 77.
v. Jones, 450, 456.
Kissam *v.* Marshall, 425.
Klauber *v.* Wright, 369.
Klemm *v.* Dewes, 390.
Klenk *v.* Schwalm, 87, 98, 100.
Klepper *v.* Powell, 51.
Klinefelter *v.* Blaine, 168.
Knap *v.* Sprague, 283.
Knapp *v.* Jay, 512.
Knight *v.* Clyde, 218.
v. Criddle, 168.
v. Dorr, 106, 425.
Knights *v.* Paul, 361.
Knisely *v.* Evans, 207.
Knox *v.* Atterburg, 422.
v. Mason, 46.
v. Protection Ins Co., 203, 239, 240.
v. Waldoborough, 39.
Kolb *v.* Kheney, 69, 85.
Kraft *v.* Raths, 198.
Krippendorf *v.* Hyde, 553, 557.
Kritger *v.* Smith, 507.
Kruse *v.* Wilson, 84.
Kuglar *v.* Shreve, 36, 45.
Kuhn *v.* Graves, 582.
v. McMillan, 410.
Kyle *v.* Connelly, 119.
Kyles *v.* Ford, 546.

L.

Lackey *v.* Seibert, 549, 586.
Lackland *v.* Garesche, 200.
Laclede Bank *v.* Keeler, 474.
Ladd *v.* Gale, 219.
Ladd *v.* Hill, 187.
v. Jacobs, 560.
v. North, 201.
Lafayette Ins. Co. *v.* French, 245, 246, 247, 277, 304.
Laidlaw *v.* Morrow, 522.
Lake Shore, &c. Ry. Co. *v.* Hunt, 257, 258.
Lamb *v.* Belden, 581, 582.
v. Day, 285.
v. Stone, 216.
Lambard *v.* Pike, 172, 256.
Lambden *v.* Bowie, 417, 427, 431.
Lamberton *v.* Merchants' Nat. Bank, 501.
Lambeth *v.* Turnbull, 159.
Lammon *v.* Feusier, 551, 553, 556.
Lamphin *v.* Douglass, 86, 97, 322.
Landers *v.* Staten Island R. R. Co., 390.
Landrey *v.* Chayret, 367, 379.
Lane *v.* Fellows, 92.
v. Jackson, 177, 314.
v. Leech, 389, 391.
v. Nowell, 194.
v. Shears, 272, 315.
v. Vick, 326.
Langdon *v.* Lockett, 222, 599.
Langford *v.* Ottumwa Water Power Co., 250, 353.
Lankin *v.* Douglass, 80.
Larabee *v.* Knight, 372.
Larrabee *v.* Walker, 202.
Latham *v.* Edgerton, 330.
Lathrop *v.* Blake, 161, 219, 262, 281.
v. Snyder, 88, 97.
Laughran *v.* Kelly, 358, 362, 367, 373.
Laughton *v.* Atkins, 17.
Laurence *v.* Yeatman, 118, 321, 331, 396.
Lawless *v.* Hackett, 540.
Lawlin *v.* Clay, 274.
Lawrence *v.* Burnham, 158.
v. Connell, 537, 541.
v. Englesby, 17.
v. Featherston, 117, 419.
v. Hagerman, 25, 449, 456.
v. Jones, 416, 430, 432.
v. Lane, 563.

Lawrence *v.* Rice, 280.
v. Smith, 227.
v. State, 275.
v. Steadman, 85.
v. Stratton, 495.
Lawton *v.* Branch, 520.
v. Keil, 425.
Lawyer *v.* Langhans, 90.
Lea *v.* Maxwell, 260.
Lea *v.* Vail, 127, 421.
Leach *v.* Cook, 157.
v. Swan, 331, 333.
v. Thomas, 422.
Leah *v.* Greenwood, 449.
Leake *v.* Moorman, 27, 430.
Learned *v.* Vanderburgh, 177.
Leathers *v.* Cannon, 43.
Lecesne *v* Cotton, 406.
Ledyard *v.* Butler, 524.
Lee *v.* Carrollton Savings and Loan Association, 518.
v. Gansel, 179.
v. O'Shannessy, 389, 392.
v. Parmer, 361.
v. Peters, 86, 91, 102.
v. Ryall, 514.
Leefe *v.* Walker, 202.
Leffingwell *v.* Warren, 326.
Legg *v.* Willard, 162.
Legro *v.* Staples, 211.
Lehman *v.* Berdin, 325, 410, 436.
Leiber *v.* Union Pac. R. R. Co., 528.
Leibman *v.* Ashbacker, 21, 511.
Leigh *v.* Smith, 514.
Leighton *v.* Heagerty, 374.
Leingardt *v.* Deitz, 360.
Leitensdorfer *v.* Webb, 57, 58.
Lemle *v.* Ronton, 400.
Le Neve *v.* Le Neve, 500.
Leon *v.* Galceran, 559.
v. Scram, 478.
Leonard *v.* Bryant, 309, 322.
v. Davis, 162.
v. Stout, 85, 91.
Le Roy *v.* E. Saginaw City Ry., 77, 79.
Leroy *v.* East Saginaw Ry., 91.
Lesher *v.* Getman, 170, 171, 181, 184, 264.
Leslie *v.* Merrill, 208.
Lessee of Adams *v.* Jeffries, 315.
Lester *v.* Abbott, 59.
v. Cummings, 81.
v. Watkins, 19.
Levitzky *v.* Canning, 453.
Levy *v.* Cowan, 156.
v. Elliott, 102, 322.
v. Levy, 88; Fitzpatrick, 328.
v. Millman, 91, 92.
Lewenthall *v.* Miss. Mills, 19.
Lewis *v.* Buck, 219.
v. Dubose, 135, 202.
v. Dunlop, 370, 372.
v. Faul, 352.
v. Harwood, 212, 474.
v. Kennedy, 53, 85.
v. Locke, 545.
v. Lyman, 160.
v. Mansfield, 568.
v. Quinker, 262.
v. Smith, 202.
v. Woodfolk, 354.
v. Wright, 432.
Lexington and Big Sandy R. R. Co. *v.* Ford Place Glass Co., 529.
Libbey *v.* Hodgdon, 35, 246.
Lick *v.* Madden, 139, 486, 489.
Lieber *v.* Union Pac. R. R. Co., 528.
Life Ass'n of America *v.* Fassett, 415
Lightle *v.* Berning, 398.
Lightner *v.* Steinagel, 219.
Likens *v.* McCormick, 275.
Lillard *v.* Carter, 105, 106, 107.
Lincoln *v.* Strickland, 257, 265.
v. Tower, 312, 335.
Lindan *v.* Arnold, 361.
Linder *v.* Aaron, 120.
Lindsay *v.* Larned, 456.
Lindsley *v.* Malone, 427.
Lipscomb *v.* McClellan, 439.
Lithgow *v.* Byrne, 83.
Little *v.* Hale, 206.
Littlejohn *v.* Lewis, 360.
v. Wilcox, 451.
Littleton Bank *v.* Portland, &c. R. R. Co., 244.
Livengood *v.* Shaw, 101.
Livermore *v.* Rhodes, 432.

Livermore *v.* Swasey, 16.
Liverpool Ins. Co. *v.* Mass. 228.
Liverpool, &c. Navigation Co. *v.* Agar & Lelong, 600.
Livingston *v.* Smith, 144, 335.
Lobdell *v.* Bushnell, 157.
Locke *v.* Lewis, 59.
Lockhart *v.* Woods, 450, 456.
Loder *v.* Littlefield, 43.
Lodge *v.* State Bank, 596.
Lodor *v.* Baker, 222.
Loket *v.* Neufville, 421.
Lomerson *v.* Huffman, 202, 361, 375.
Long *v.* Murphy, 414, 483.
Looker *v.* Halcomb, 457.
Lord *v.* Baldwin, 107.
v. Devendorf, 59.
Loring *v.* Wittich, 389, 392.
Lorman *v.* Phœnix Ins. Co., 359, 367, 375.
Lorrain *v.* Higgins, 108.
Los Animas Co. Commissioners *v.* Bond, 235.
Lott *v.* Hubbard, 144.
Louis Per. Ins. Co. *v.* Cohen, 361.
Louisville R. R. *v.* Letson, 600.
Louisville, &c. R. R. Co. *v.* Nicholson, 394.
Lounsbury *v.* Purdy, 524.
Love *v.* Fairfield, 118.
v. Harper, 494.
v. Voorhies, 20, 403, 405, 436, 507.
v. Young, 95.
Lovejoy *v.* Albree, 227, 345.
v. Hutchins, 177, 262, 264, 280, 281, 314, 322.
v. Lee, 221.
v. Lunt, 275.
Lovelady *v.* Harkins, 137, 141, 263.
Lovell *v.* Sabin, 281.
Loveridge *v.* Plaistow, 179.
Lovett *v.* Matthews, 17.
Lovier *v.* Gilpin, 144, 426, 427.
Lowe *v.* Derrick, 127, 421.
Lowenstine *v.* Gillispie, 274.
Lowenstein *v.* Monroe, 22, 442, 450.
Lowry *v.* Clements, 514.
v. Howard, 510, 513.
Lowry *v.* McGee, 405, 510, 511, 513.
v. Stowe, 118, 127, 427, 428.
v. Walker, 281.
Loyless *v.* Hodges, 593.
Lucas *v.* Campbell, 223, 385.
v. Goodwin, 252, 253.
Luce *v.* Hoisington, 185, 187.
Lucky *v.* Miller, 118.
Ludden *v.* Leavitt, 281, 284.
Ludlow *v.* Ramsey, 44, 86, 102, 299.
Lundie *v.* Bradford, 195, 202.
Lupton *v.* Cutter, 168.
Lush *v.* Galloway, 342.
Luther *v.* Borden, 326; Lutes *v.* Perkins, 396.
Luttin *v.* Benin, 179.
Lutz *v.* Kelley, 513.
Lyford *v.* Demerritt, 563.
v. Tyrrel, 179.
Lyle *v.* Barker, 159, 212.
v. Foreman, 39, 45.
Lyman *v.* Lyman, 289.
v. Wood, 218.
Lynch *v.* Hoffman, 102.
v. Mechanics' Bank, 545.
Lynd *v.* Pickett, 145, 185, 187.
Lynde *v.* Watson, 366.
Lyon *v.* Blakesly, 87, 89.
v. Fairfield County, 234.
v. Rood, 177.
v. Sanford, 171.

M.

McAllister *v.* Brooks, 562, 565.
v. Pa. Ins. Co., 247.
McAlpine *v.* Sweetzer, 560.
v. Woodruff, 453.
McBee *v.* The State, 264.
McBride *v.* Floyd, 413, 478.
v. Harn, 21, 530, 582.
McBurnie *v.* Overstreet, 187.
McCandish *v.* Hopkins, 119.
McCarthy *v.* Goold, 168.
v. Marsh, 16.
McCartney *v.* Branch Bank, 103.
McCarty *v.* McPherson, 214, 387.
McCaulley *v.* Shute, 58.
McClellan *v.* Lipscomb, 287.
v. Young, 237.

McClosky *v.* Wingfield, 401.
McCobb *v.* Tyler, 492, 597.
McCoid *v.* Beatty, 213.
McCollem *v.* White, 38, 44, 80, 90, 509, 510, 513.
McCollough *v.* Grishhobber, 455.
McComb *v.* Reed, 281.
McCombs *v.* Allen, 13, 20, 102, 407.
McCook *v.* Willis, 118, 421.
McCormac *v.* Hancock, 201.
McConn *v.* New York, 131.
McCraw *v.* Welch, 100.
McCreary *v.* Topper, 223.
McCullough *v.* Carragan, 204.
McCulloch *v.* Foster, 77, 92.
McDaniel *v.* Gardner, 22, 27, 444, 445.
v. Sappington, 116.
McDonald *v.* Badger, 524.
v. Fist, 421.
v. Forsyth, 63.
v. Gillet, 201, 244.
v. Simcox, 522, 564.
v. Vinette, 355.
McDougall *v.* Board, etc., 237.
McDougal *v.* Hennepin Co., 233.
McEachin *v.* Reid, 527.
McElhaney *v.* Gilleland, 552.
McElmoyle *v.* Cohen, 336, 338, 339.
McFarland *v.* Farmer, 160.
McFerran *v.* Wherry, 419.
McGarran *v.* Haupt, 495.
McGáry *v.* Hastings, 453.
McGehee *v.* Walke, 202.
McGinty *v.* Flannagan, 59.
McGoon *v.* Scales, 532.
McGoren *v.* Avery, 543.
McGovern *v.* Haupt, 499.
McGown *v.* Sprague, 77.
McGuire *v.* Pitts, 213.
McHaney *v.* Cawthorn, 93, 155.
McIlvaine *v.* Lancaster, 196, 200.
McIntyre *v.* White, 118.
McKay *v.* Harrower, 281.
McKean *v.* Turner, 202.
McKee *v.* Hicks, 398.
McKenzie *v.* Bentley, 46.
v. Buchan, 421.
v. Noble, 222.
v. Ramsay, 331.
McKinney *v.* Farmers' Bank, 57.
McKiernan *v.* Massingill, 95.
McKinsey *v.* Anderson, 426.
McKinney *v.* Baker, 505.
v. Collins, 8, 312, 322.
v. Purcell, 161.
McKittrick *v.* Clemens, 364.
McKnight *v.* United States, 539, 543.
McLain *v.* Simington, 123.
McLaughlin's Admr. *v.* Daniel, 538.
McLaughlin *v.* Swann, 199.
McLellan *v.* Young, 236.
McLoud *v.* Selby, 234.
McMechan *v.* Griffing et al., 174, 501, 509, 524.
McMeekin *v.* Johnson, 259.
McMillan *v.* Dana, 409, 437.
v. Richards, 206.
McMillen *v.* Lockard, 164.
McMinn *v.* Hall, 213.
McNamara *v.* Ellis, 78, 419.
McNeal *v.* Roach, 374, 375.
McNeilage *v.* Halloway, 169.
McPhail *v.* Gerry, 499.
v. Hyatt, 561.
McPherson *v.* Snowden, 27, 222.
McQueen *v.* Middleton Man. Co., 246.
McQuiddy *v.* Ware, 538.
McRae *v.* Austin, 403, 405.
v. Brown, 451, 453, 521.
v. McLean, 397.
McReady *v.* Rogers, 449.
McReynolds *v.* Neal, 77, 425.
Mack *v.* McDaniel, 55, 56.
Mackalley's Case, 138.
Mackubin *v.* Smith, 69.
Macomber *v.* Doane, 362.
v. Parker, 162.
v. Wright, 205.
Maduel *v.* Mous-eaux, 201, 203.
Magee *v.* Beirne, 17.
v. Callan, 404.
v. Carpenter, 499.
Magoffin *v.* Mandeville, 275.
Magoon *v.* Gillett, 105, 425.
Magrath *v.* Hardy, 133.
Mahanny *v.* Rephart, 372.
Maher *v.* Brown, 210.
Mahon *v.* Boardman, 102.
Main *v.* Bell, 109, 145, 468

Maine Ins. Co. *v.* Weeks, 168, 169, 202.
Mairett *v.* Mariner, 86, 101.
Malley *v.* Altman, 314.
Malone *v.* Lindley, 36.
Malsom *v.* Spoor, 179, 283.
Maltingly *v.* Grimes, 201.
Mamlock *v.* White, 144.
Manchester *v.* McKee, 470.
Mandel *v.* McClure, 481.
Mandell *v.* Peet, 43, 49, 86, 91, 96, 121, 428.
Manice *v.* Gould, 389.
Manley *v.* Headley, 77, 92.
Mann *v.* Brewer, 410.
v. Buford, 218, 223.
v. Exrs. of Mann, 168.
Mansfield *v.* Rutland Manf. Co., 213.
Mansard *v.* Daley, 211, 213.
Mansur *v.* Coffin, 423.
Manton *v.* Poole, 94.
Mantz *v.* Headley, 78, 82, 92, 119, 421,
Manuf. Co. *v.* Taylor, 230. [427, 430.
Manuf. Bank *v.* Osgood, 367.
Maples *v.* Tunis, 77.
Marion *v.* Faxon, 157.
Markham *v.* Gehan, 205.
Marks *v.* Reinberg, 358.
Marnine *v.* Murphy, 117, 421.
Marqueze *v.* Le Blance, 527.
v. Southeimer, 61, 62, 188, 449, 565.
Marsh *v.* Backus, 145, 184.
v. Davis, 367, 564.
v. Fulton, 539, 543.
v. Pier, 402, 404.
v. Steele, 114, 322.
v. Williams, 71.
Marshall *v.* Alley, 87, 420.
v. Hosmer, 150, 566.
v. White, 63.
Marston *v.* Baldwin, 263.
v. Carr, 168.
v. Dewberry, 525.
Martin *v.* Bagley, 154.
v. Bailey, 553.
v. Branch Bank, 35.
v. Dortch, 119.
v. Dryden, 315, 320, 321, 330, 524, 568.
Martin *v.* Foreman, 342, 595.
v. McCormick, 538.
v. McKinney, 331.
v. Thierry, 389, 391.
v. Thompson, 117, 421.
Martz *v.* D. & F. M. Ins. Co., 366.
v. Detroit Ins. Co., 203.
Marvel *v.* Houston, 223, 226.
Marvin *v.* Hawley, 220, 598.
Marx *v.* Abraham, 27, 75, 78, 105, 106, 321, 425.
Maryland *v.* Balt. & O. R. R., 237.
Mass. Nat. Bank *v.* Bullock, 213, 215.
Mason *v.* Ambler, 363.
v. Anderson, 252, 253, 261, 265.
v. Messenger, 330.
v. Stewart, 120.
v. Suttle, 549.
Massey *v.* Scott, 9, 312, 320, 322, 507.
v. Walker, 434.
Masters *v.* Turner, 519.
Matheney *v.* Earl, 517.
Matheny *v.* Galloway, 361.
v. Hughes, 171.
Mathias *v.* Yetts, 541.
Matter of Bliss, 90, 93, 108.
Brown, 90.
Chipman, 43.
Clark, 271, 274, 332.
Faulkner, 8, 90, 93, 409.
Fitch, 90, 93.
Fitzgerald, 38, 43.
Marty, 412.
Schroeder, 43, 50.
Warner, 43, 51.
Wrigley, 39, 40.
Matthews *v.* Ausley, 139.
v. Dare, 80.
v. Densmore, 78, 88, 89, 146.
v. Sands, 345.
v. Smith, 342.
Mattingly *v.* Boyd, 293, 549, 595.
v. Grimes, 196.
Maude *v.* Rhodes, 305, 322, 338.
Maulsby *v.* Farr, 252, 253.
Maupin *v.* Va. Lead Mining Co., 507.
Maury *v.* Roberts, 481.
Mavity *v.* Eastbridge, 560.

May *v.* Baker, 27.
v. Courtney, 415.
v. Ferrill, 142.
Mayberry *v.* Steagall, 415, 483.
Mayes *v.* Phillips, 168.
Mayer *v.* Chattahoochie Nat. Bank, 213.
v. Liverpool Ins. Co., 246.
Mayfield *v.* Bennett, 9, 390.
Mayor *v.* Dunnavant, 453.
Mayor of New York *v.* Sibberus, 552.
Mayor, etc. of New York *v.* Genet, 94.
Mayor, etc. *v.* Horton, 238.
Maxwell *v.* McBrayer, 63.
v. Stewart, 13, 312.
Meacham *v.* Corbitt, 203.
v. McCorbitt, 492.
Mead *v.* Bunn, 541.
Meade *v.* Smith, 145, 185.
Meadowcroft *v.* Agnew, 196, 199.
Mean *v.* N. Y., Housatonic & Northern R. R. Co., 212, 495.
Means *v.* Brickell, 541.
Meany *v.* Head, 263.
Mears *v.* Winslow, 595.
Mechanic's & Trader's Bank *v.* Hodge, 222.
Meek *v.* Fox, 49.
Megee *v.* Beirne, 318.
Meggs *v.* Shaffer, 427.
Meinhard *v.* Lillienthal, 429, 468.
Meints *v.* East St. Louis Rail Mill Co., 250.
Meldrum *v.* Snow, 160.
Melton *v.* Troutman, 456.
Melville *v.* Brown, 158, 187, 525.
Memphis *v.* Laski, 237.
Menderson *v.* Specker, 181.
Mendes *v.* Freiters, 75, 89, 414, 425, 477.
Menley *v.* Zeigler, 172, 251, 253, 256.
Menkel *v.* Gumbel, 484.
Mentz *v.* Hamman, 264.
Merced Bank *v.* Morton, 80, 323.
Merchants' Bank of Baltimore *v.* Campbell, 542.
Merchant *v.* Preston, 59.
Meriam *v.* Rundlett, 562.
Merrick *v.* Hutt, 582.
v. Van Santvoord, 246.
Merrill *v.* Campbell, 222, 234, 235, 237.
v. Law, 109.
v. Montgomery, 77.
v. President, &c. of Kalamazoo, 545.
Merritt *v.* Miller, 265.
Mersereau *v.* Norton, 156.
Merwin *v.* City of Chicago, 237.
Meshew *v.* Gould, 284.
Messenger *v.* Klinter, 315.
Messner *v.* Hutchins, 78, 92, 120.
v. Lewis, 120, 122, 178, 417, 434.
v. Woodman, 162.
Metcalf *v.* Clark, 181.
v. Steele, 514
v. Young, 450.
Metrovitch *v.* Jovovich, 401.
Metts *v.* Ins. Co., 21, 27, 323, 477, 500
Meuse *v.* Osbern, 418.
Meyer *v.* Deffarge, 381.
Meyers *v.* Smith, 372.
v. Ulrich, 561.
Michels *v.* Stork, 389.
Michew *v.* McCoy, 396.
Mich. Cent. R. R. *v.* Chicago, &c. R. R. Co., 243.
Micky *v.* Stratton, 317.
Middlebrook *v.* Ames, 50.
Mildmay *v.* Smith, 280.
Millar *v.* Babcock, 275, 321, 331, 333.
Millaudon *v.* Foucher, 92.
Milleken *v.* Dart, 54, 503.
Miller *v.* All, 81.
v. Baker, 145, 263.
v. Bowles, 407, 505.
v. Brinkerhoff, 108.
v. Bryan, 495.
v. Chandler, 84, 433.
v. C. M. & St. Paul Ry. Co., 81, 96
v. Dungan, 8, 10, 312, 322, 335
v. Ewing, 19.
v. Fay, 136, 173, 252, 262, 263.
v. Garrett, 453.
v. Handy, 330, 333.

Miller *v.* Hooe, 227.
v. McLain, 563.
v. McMillan, 252.
v. Richardson, 196, 218.
v. Sharp, 305, 323, 338.
v. State, 391.
v. Whitehead, 391, 530.
Millison *v.* Fisk, 219, 222, 236, 237.
Mills *v.* Brown, 49, 108, 156, 176.
v. Martin, 330.
Miltenberger *v.* Lloyd, 416.
Mims *v.* Parker, 202.
Minard *v.* Lawler, 597.
Mineral Point R. R. Co. *v.* Barron, 204.
Mineral Point R R. Co. *v.* Keep, 35.
Minniece *v.* Jeter, 84.
Minza *v.* Zollicoffer, 63.
Miss. &c. R. R. Co. *v.* U. S. Express Co., 244, 527.
Mizell *v.* McDonald, 512.
Mobile *v.* Rowland, 237.
Mobley *v.* Loubat, 204.
Mock *v.* King, 223.
Mocklee *v.* Gardner, 538.
Molm *v.* Barton, 282.
Molton *v.* Ercott, 484.
Monlon *v.* Trenton Ins. Co., 246.
Monroe *v.* Cutter, 402, 405.
Montague *v.* Gaddis, 56.
Montgomery Gas Light Co. *v.* Merrick, 361, 521.
Montgomery *v.* Merrill, 261.
v. Tilley, 55.
Montpelier, &c. R. R. Co. *v.* Coffrin, 27, 314, 322.
Moody *v.* Alter, 266.
v. Levy, 80, 419.
Mooney *v.* Union Pac. R. R. Co., 360.
Moor *v.* Towle, 197.
Moore *v.* Allain, 472, 473.
v. Angiolette, 432.
v. Chicago, &c. R. R Co., 204.
v. Coates, 251.
v. Dickerson, 389.
v. Fedawa, 21, 530.
v. Gennett, 248.
v. Graves, 161, 219.
v. Hawkins, 427.
Moore *v.* Hamilton, 27.
v. Holt, 21, 38, 45, 342, 489, 593.
v. Kidder, 172, 251, 255, 256, 593
v. Jackson, 509, 510, 513.
v. Mayor of Chattanooga, 237
v. Murdock, 159.
v. Pillow, 168.
v. Reaves, 502.
v. Sample, 525.
v. Sheppard, 71.
v. Stainton, 344.
v. Stanley, 274.
v. Westervelt, 281.
v. Whittenburg, 219.
v. Willenberg, 22, 444.
Moresi *v.* Swift, 21, 27, 283, 289, 322, 448, 477, 483.
Morey *v.* Sheltus, 202.
Morgan *v.* Avery, 42, 51, 412, 417, 431.
v. Campbell, 407, 505.
v. Curtenius, 326.
v. House, 77.
v. Idle, 160.
v. Johnson, 258.
v. Morgan, 118.
v. Richards, 139.
v. Nunes, 38, 40, 44.
v. Woods, 274.
Morrill *v.* Keyes, 185, 188.
Morris *v.* Hogle, 275, 321, 330, 331, 333.
v. Price, 451.
v. Union Pacific R. R. Co., 305, 322.
Morrison *v.* Alphin, 403.
v. Blodgett, 525.
v. Crawford, 445, 456.
v. Lovejoy, 90, 93, 135.
v. Ream, 109.
Morse *v.* Holt, 194.
v. Hurd, 145, 159, 186, 263.
v. Goold, 330.
v. Marshall, 375.
Morton *v.* Robards, 495.
Moses *v.* Arnold. 414.
v. Waterbury Button Co., 399.
Mosher *v.* Banking House, 267.
Mosher *v.* Bartholow, 9.

Mozarietta *v.* Saenz, 274.
Miuth *v.* Schardin, 201, 240, 243, 244.
Mullen *v.* Maguire, 380.
Mulford *v.* Stalzenback, 329.
Mulloy *v.* White, 464.
Muncy *v.* Joest, 560.
Munroe *v.* Cocke, 88.
v. Frosh, 40.
v. Luke, 174.
Murdock *v.* Daniel, 514.
Murdough *v.* McPherrin, 141, 425.
Murphy *v.* Adams, 23, 66.
v. Ames, 389.
v. Baldwin, 36, 37, 39, 40.
v. Caldwell, 375.
v. Purdy, 93.
Murray *v.* Cone, 82, 120.
v. Elrige, 491.
v. Hankin, 96.
v. Munford, 451, 453, 469.
v. Vanderbilt, 396.
Murrell *v.* Johnson, 222.
Murtagh *v.* Connor, 289.
Musgrave *v.* Brady, 27, 423.
Muskingum Valley Turnpike *v.* Ward, 274.
Mutherrin *v.* Hill, 95.
Myatt *v.* Lockhart, 213.
Myer *v.* Liverpool, &c. Ins. Co., 216.
Myers *v.* Farrell, 9, 51, 53, 312, 323.
v. Lewis, 82, 119, 421.
v. Mott, 165.
v. Myers, 181.
v. Perry, 416, 436.
v. Smith, 8, 20, 27, 205, 312, 322, 391, 402, 406.

N.

Napper *v.* Noland, 92.
Narcross *v.* Widgery, 500, 501.
Narragnagus *v.* Wentworth, 120.
Nash *v.* Farrington, 166.
Nason *v.* Esten, 181.
Nashville *v.* Potomac Ins. Co., 366, 372.
Nashville Bank *v.* Ragsdale, 165.
Nat. Bank *v.* Huntington, 248.
National Bank *v.* Teal, 75.
v. Titsworth, 354.
Nat. Bank of Commerce *v.* Titsworth, 265.
National Bank of Missouri *v.* Stanley, 195.
Nat. S. L. Bank *v.* Mech. Nat. Bank, 144.
Nations *v.* Johnson, 272, 315.
Naylor *v.* French, 38, 43, 58.
Nazoo *v.* Cragin, 312.
Neal *v.* Bookout, 416.
v. Gordon, 94, 323.
v. Newland, 481.
Neale *v.* Ultze, 486, 493.
Neally *v.* Judkins, 137, 423.
Neill *v.* Glass, 159.
Nelson *v.* Connor, 222.
v. Cook, 184, 264.
v. Hyde, 412, 416.
v. Munch, 88, 97, 98, 102, 413, 430.
v. Simpson, 177, 314, 321.
Nesbitt *v.* Ware, 202.
Neves *v.* Scott, 326.
Neuer *v.* O'Fallon, 196, 222, 238.
Newcomb *v.* Presbrey, 543.
Newdigate *v.* Davy, 543.
Newell *v.* Blair, 211, 358, 374.
v. Great Western Ry. Co., 246.
New England Ins. Co. *v.* Chandler, 199.
Newhall *v.* Buckingham, 525.
N. H. Ins. Co. *v.* Platt, 168, 169.
New Haven Saw Mill Co. *v.* Fowler, 222.
Newman *v.* Kane, 281.
v. Krain, 58, 321.
v. Manning, 517.
N. A. R. R. Co. *v.* Combs, 549.
New Orleans &c. *v.* Beard, 480.
v. Garland, 27, 92.
&c. *v.* Hemphill, 272, 315.
v. Morris, 483.
Canal & Banking Co. *v.* Comly, 43, 51.
N. O. M. & C. R. R. Co. *v.* Long, 350.
Newton *v.* Adams, 283.
N. Y. & Erie Bank *v.* Codd, 428, 431.

Nicholls *v.* Lawrence, 82, 260.
v. Scofield, 217.
Nichols *v.* Goodheart, 200, 201, 244.
v. Levy, 326.
v. Patten, 177, 251, 314, 322.
v. Valentine, 281.
Nicholson *v.* Leavitt, 59.
Nickerson *v.* Chase, 201, 224.
Nixon & Chatfield *v.* Nash & Atkinson, 205.
Noble *v.* Bourke, 387.
v. Thompson Oil Co., 562.
Nockles *v.* Eggspieler, 445, 451.
Nolan *v.* Royston, 105, 106.
Nolle *v.* Thompson, 22, 444.
Noonan *v.* Pomeroy, 109.
Nordhaus *v.* Peterson Brothers, 113, 450, 455.
Norman *v.* Jackson Circuit Judge, 321.
Norris *v.* Watson, 176.
North *v.* Belden, 495.
v. McDonald, 49.
North Central R. R. Co. *v.* Rider, 193.
Northwestern Ins. Co. *v.* Atkins, 203.
Norton *v.* Moyers, 537, 541.
v. Rock Co., 543.
v. Winter, 598.
Norwell *v.* Porter, 193, 261, 267.
Noyes *v.* Johnson, 503.
Nutter *v.* Connett, 50, 55, 493, 582, 595.
Nutter *v.* Framingham & Lowell R. R. Co. & Trustee, 367.
Nye *v.* Liscomb, 227.
v. VanHusan, 59.
Nudd *v.* Burrows, 328.

O.

Ober *v.* Mathews, 364.
O'Brien *v.* Collins, 238, 492.
v. Daniel, 87, 331, 333.
v. Liddell, 599.
O'Connor *v.* Blake, 581.
Odiorne *v.* Colley, 161, 219, 286, 288.
O'Donald *v.* Constant, 163.
Odom *v.* Shackelford, 261.
Oelrichs *v.* Spain, 453.
Oeters *v.* Aehle, 323, 318.
Ogden *v.* Walters, 69.
O'Farrell *v.* Heard, 78, 145, 423, 544.
Offutt *v.* Edwards, 43, 432, 449.
O'Grady *v.* Julian, 456.
Ohio & Miss. R. R. Co., *v.* Alvey, 560, 562.
Ohors *v.* Hill, 171.
Ohio, &c. R. R. Co. *v.* Shultz, 329.
Olcott *v.* Robinson, 274.
Oldham *v.* Ledbetter, 357.
v. Scrivener, 219.
Oliphant *v.* Mansfield, 453.
Oliver *v.* Smith, 222.
v. C. & A. R. R. Co., 239, 359, 394.
v. Gwin, 438.
v. Lake, 160.
v. Town, 86, 101.
v. Wilson, 43, 127, 421.
Olmstead *v.* Rivers, 75, 114, 412.
Onley *v.* Shepherd, 259.
O'Neal *v.* Owens, 422.
Oppenheim *v.* Pittsburg, Cin. &c. R. R. Co., 522, 560.
O'Reilly *v.* Freel, 432, 433.
Ordiorne *v.* Colley, 281.
Ordway *v.* Remington, 203.
Orth *v.* Jennings, 524.
Osborne *v.* Robbins, 413, 417.
v. Schiffer, 420.
Osgood *v.* Blackmore, 330.
v. Breed, 17.
v. Holyoke, 137, 423.
Our House No. 2 *v.* State, 560.
Overton *v.* Hill, 220.
Owens *v.* Starr, 144.
Owen *v.* Jordan, 331.
Oysted *v.* Shed, 256.

P.

Pace *v.* Lee, 477, 483.
v. Smith, 219.
Packard *v.* Wood, 163.
Padden *v.* Moore, 342, 344.
Paddock *v.* Kittredge, 538, 541.
v. Matthews, 416.
Padfield *v.* Brine, 168.
Page *v.* Ford, 119, 120.
v. Generes, 251, 258.

Page *v.* Thrall, 285.
Paine *v.* Farr, 251.
v. Mooreland, 270, 271, 298, 323, 325.
v. Tilden, 423.
Paihles *v.* Roux, 426.
Palmer *v.* Ballard, 361.
v. Oakley, 276, 315.
Pancake *v.* Harris, 78.
Pancoast *v.* Washington, 8, 312.
Pangburn *v.* Patridge, 263.
Paradise *v.* Farmers' and Merchants' Bank, 161, 181.
Park *v.* Harmon, 423.
v. Matthews, 199.
v. Trustees of Williams, 63.
Parker *v.* Brady, 13, 416, 469.
v. Danforth, 203.
v. Donnally, 293.
v. Farr, 402, 593.
v. Kinsman, 295, 595.
v. Parker, 593.
v. Pistor, 525.
v. Scott, 85, 91.
v. Walrod, 77, 91.
Parkham *v.* Randolph, 541.
Parks *v.* Cushman, 165, 224.
v. Sheldon, 407.
Parmele *v.* Johnson, 86, 91.
Parshley *v.* Green, 165.
Parsons *v.* Case, 428, 429.
v. McGavock, 237.
v. Paine, 13, 274, 467.
v. Sprague, 416.
v. Stockbridge, 52, 100.
v. Wells, 472.
Patch *v.* Wessels, 21, 172, 176, 177, 282.
Patrick *v.* Solinger, 137, 423.
Patterson *v.* Goodrich, 412, 413, 416.
v. Gulnare, 105, 107.
v. Stephenson, 488.
Patton *v.* Garrett, 188, 449, 452, 565.
v. Smith, 202.
Paul *v.* Burton, 177.
v. Paul, 202, 376.
v. Reed, 202.
v. Slason, 285.
v. Virginia, 246.
Paul *v.* Ward, 420.
Pawley *v.* Gaines, 221.
Paxton *v.* Steckel, 145, 263, 264.
Payne *v.* Snell, 403, 437.
Peace *v.* Jones, 203.
Peacock *v.* Bell, 330.
Peak *v.* Buck, 354.
Pearce *v.* Baldridge, 256.
v. Bell, 75.
v. Shorter, 205.
Pease *v.* Underwriters' Union, 250.
Peck *v.* Barnum, 206.
v. Fisher, 155.
v. Guerney, 541.
v. Stratton, 212, 482, 484.
v. Webber, 21.
Peckham *v.* North Parish in Haverhill, 246.
Peet *v.* McDaniel, 202.
v. Whitmore, 217.
Peevey *v.* Cabaniss, 470.
Peiser *v.* Cushman, 122.
Pelton *v.* Platner, 265.
Pendleton *v.* Perkins, 238.
v. St. Louis, 237.
Penhallow *v.* Dwight, 176.
Penman *v.* Gardner, 416.
Penn *v.* Edwards, 460.
v. Pelan, 352.
Pennebaker *v.* Tomlinson, 230.
Penniman *v.* Ruggles, 196, 221.
Pennoyer *v.* Neff, 8, 104, 272, 277, 305, 309, 317, 340.
Pa. Steel Co. *v.* N. J. Southern R. R. Co., 321, 484.
Pa. Railroad *v.* Peoples, 47, 63, 244.
Penny *v.* Little, 509, 524.
Penton *v.* Brown, 179.
People *v.* Baker, 312, 322.
v. Cameron, 9, 29, 397, 402.
v. Gray, 274.
v. Huber, 275.
v. Johnson, 213.
v. Lucas, 552.
v. Mayor, etc. 237.
v. McClay, 37.
v. Schuyler, 145, 188, 552.
v. Wheeler, 259.
People's Bank *v.* Shryock, 525.

Peoria Ins. Co. *v.* Warner, 28.
Pepper *v.* Dunlap, 472.
Perkins *v.* Bragg,
166, 509, 510, 513, 526.
v. Parker, 565.
v. Pike, 67.
v. Pitman et al., 149.
Perley *v.* Foster, 281.
Perminter *v.* McDaniel, 398.
Perrin *v.* Leverett, 256.
Perrine *v.* Evans, 36, 40.
Perry *v.* Carr, 179.
v. Coates, 168, 169.
v. Post, 400.
v. Thornton, 223.
v. Williams, 145, 159, 186.
Peters *v.* Conway, 183.
v. The Warren Ins. Co., 17.
Petit *v.* Mercer, 449.
Petters *v.* McClannahan, 329.
Pettes *v.* Spalding, 205.
Pettibone *v.* Griswold, 495.
Pettingill *v.* Andr. R. R. Co., 244.
Pettit *v.* Mercer, 113, 445.
v. Owen, 448.
Petty *v.* Clark, 538.
Pfoutz *v.* Comford, 38, 43.
Phelps *v.* Baker, 305, 322.
v. Boughton, 265.
v. Coggeshall, 451.
v. Holker, 8, 312, 322, 338.
v. White, 541.
v. Young, 88, 91.
Phillipsburg Bank *v.* Lackawanna R. R. Co., 35, 36, 431, 432.
Phillips *v.* Bridge, 280, 289, 448.
v. Cook, 525.
v. Germon, 204, 267.
v. Hines, 20, 403.
v. Stewart, 507.
v. Welch, 302, 322, 412.
Philpot *v.* Newman, 136, 423.
Phœnix Bank *v.* Risley, 539.
Pickering *v.* Wendell, 196.
Pickhardt *v.* Anthony, 80, 89.
Picquet *v.* Swan,
159, 212, 223, 335, 358.
Pierce *v.* Atwood, 139.
v. Bell, 425.
Pierce *v.* Carleton, 161, 202,
219, 221, 345, 361, 375.
v. Crompton, 415.
v. Hall, 500.
v. Jackson, 165, 400.
v. Myers, 432.
v. Shorter, 168, 170.
v. Smith, 27, 90, 93, 108.
v. Strickland,
120, 256, 264, 280.
Pierson *v.* Hovey, 285.
v. Robb, 524.
v. Weller, 199.
Pillsbury *v.* Small, 288.
Pinson *v.* Kirsh, 448.
Pioneer Printing Co. *v.* Sanborn, 375.
Piquet *v.* Swan, 328.
Piper *v.* Piper, 202, 224, 376.
Piscataqua *v.* Kingsbury, 536.
Piscataqua Bank *v.* Turnley, 63.
Pitkins *v.* Boyd, 102.
Pittman *v.* Searcey, 417.
Pitts *v.* Boroughs, 43.
Pittstown *v.* Plattsburgh, 237.
Pixley *v.* Hoggins, 524.
v. Reed, 445, 456.
Place *v.* Sweetzer, 525.
Plant *v.* Smythe, 165, 212, 524.
Planters' Bank *v.* Byrne, 27, 116.
Planters' & Merchants' Bank *v.* Andrews, 35, 118, 127, 415, 421.
Planters' & Merchants' Bank *v.* Leavens, 240, 245.
Plater *v.* Hepburn, 464.
Platt *v.* Brown, 178.
Plimpton *v.* Bigelow, 245, 249.
Plummer *v.* Plummer, 548.
v. Rundlett, 197.
Plumpton *v.* Cook, 422.
Poage *v.* Poage, 92.
Polk *v.* Wendall, 539.
Pollard *v.* Ross, 221.
Polley *v.* Lenox Iron Works, 180.
Pollock *v.* Gantt, 450.
Pomeroy *v.* Betts, 275.
v. Ricketts, 89, 394.
v. Stevens, 495.
Pomroy *v.* Kingsley, 288.
v. Parmlee, 181.

Pond *v.* Baker, 251, 253, 256, 567.
v. Griffin, 492, 582, 597.
Pool *v.* Symonds, 281.
Poole *v.* Dyer, 410.
v. Webster, 27, 82, 83.
Pope *v.* Cutler, 276, 315.
v. Haman, 525.
v. Hibernia Ins. Co., 71, 357.
v. Hunter, 117, 421.
Porter *v.* Byrne, 172, 256.
v. Earthman, 494.
v. Hildebrand, 63, 228, 242.
v. Miller, 142.
v. Millett, 524.
v. Partee, 464.
v. Pico, 173, 252, 253, 256, 262, 416, 523.
v. Stephens, 367.
Post *v.* Leet, 543.
Post *v.* Love, 223.
Pote *v.* Bacon, 545.
Potomac Steam Boat Co. *v.* Clyde, 312, 320, 321, 331, 389, 390, 392.
Potter *v.* Cain, 203.
v. Sanborn, 40.
Potter & Stymus Manufac. Co. *v.* Taylor, 230.
Pounds *v.* Hamner, 368, 453.
Powell *v.* Matthews, 57.
v. McKee, 181.
v. Sammons, 202.
Powers *v.* Hurst, 92.
v. People, 330.
Prather *v.* Chase, 262.
Pratt *v.* Wheeler, 172; Albright, 344.
Prentiss *v.* Bliss, 161, 219, 221, 598.
Prescott *v.* Heard, 495, 500.
v. Hull, 367, 564.
v. Locke, 162.
v. Parker, 597.
President of Union Turnpike Co. *v.* Jenkins, 237, 239.
Presler *v.* Turner, 560.
Pressnall *v.* Mabray, 202.
Preston *v.* Frye, 538, 541.
Preston *v.* Yates, 150.
Prewitt *v.* Carmichael, 63.
Price *v.* Brady, 168.
v. Higgins, 527.
Price *v.* Jackson, 548.
v. Merritt, 27.
v. Reed, 414.
v. Sharp, 430.
Priest *v.* Rice, 495, 496, 501, 502.
Prince *v.* Clark, 106, 410.
Probst *v.* Scott, 171.
Proctor *v.* State, 331.
Propeller Hilton *v.* Miller, 558.
Proper *v.* Cobb, 158.
Proskey *v.* West, 118, 127.
Prout *v.* Grout, 170, 171.
Providence & Stonington S. S. Co. *v.* Va. Fire and Marine Ins. Co., 171.
Pruitt *v.* Armstrong, 203.
Pry *v.* Hannibal & St. Jo. R. R. Co., 389, 591.
Puff *v.* Hutcher, 521.
Pullian *v.* Nelson, 428.
Pulsifer *v.* Waterman, 155.
Purcell *v.* Steele, 398.
Purdy *v.* Irwin, 524.
Putnam *v.* Hall, 140.
Pyle *v.* Cravens, 274.

Q.

Quarles *v.* Robinson, 87, 108.
Quigg *v.* Kittredge, 218.
Quine *v.* Mayers, 436, 438.
Quinn *v.* Halbort, 499.
Quinland *v.* Danford, 418.

R.

Race *v.* Maloney, 269, 322.
Raefle *v.* Moore, 224, 225.
Raignel *v.* McConnell, 168.
R. R. Co. *v.* Coffrin, 288.
Railroad Co. *v* Whitton, 600.
Railroad *v.* Peoples, 228, 372, 512.
Railroad *v.* Todd, 355, 357, 464, 517.
Rancher *v.* McElhenny, 434.
Rand *v.* White Mountain R. R., 202.
Randall *v.* Way, 367.
Randolph *v.* Little, 514, 528.
Rankin *v.* Dulaney, 251.
Ranlett *v.* Blodgett, 148, 150, 566.
v. Constance, 449.

Ranning *v.* Reeves, 117, 422.
Ransom *v.* Halcott, 178, 566.
v. Hays, 202.
v. Williams, 330.
Rapp *v.* Kyle, 269.
Rasch *v.* Moore, 96.
Rathbone *v.* Ship London, 403.
Ravenga *v.* Mackintosh, 455.
Raventas *v.* Green, 176.
Raver *v.* Webster, 63, 455.
Rawlins *v.* Nickham, 541.
Ray *v.* Underwood, 227.
Raymond *v.* Green, 22, 123, 441, 451.
v. Rockland Co., 250.
Rayne *v.* Taylor, 36, 40.
Raynes *v.* Lowell, etc. Society, 199.
Raynor *v.* Pacific National Bank, 143.
Re Flandrow, 223.
Re Macauly, 391.
Read *v.* Jeffries, 22, 441.
v. Sprague, 161, 375.
v. Ware, 417.
Reams *v.* McNail, 144.
Reaugh *v.* McConnel, 392.
Redd *v.* Burns, 213.
Reddick *v.* Smith, 161, 219, 221.
Reddy *v.* Bego, 45.
Redgrave *v.* Hurd, 541.
Reding *v.* Ridge, 92.
Redington *v.* Frye, 67.
Redman *v.* White, 214, 387.
Redus *v.* Wofford, 84, 262, 586.
Redwitz *v.* Waggarnan, 484.
Redwood *v.* Consequa, 47, 78.
Reed *v.* Beach, 63.
v. Ennis, 426, 480.
v. Howard, 158, 525.
v. Ketch, 38.
v. Ownby, 165.
v. Perkins, 259.
v. Whitton, 560.
Reese River S. M. Co. *v.* Smith, 541.
Reeves *v.* Comly, 43, 51.
Regan *v.* Pac. R. R. Co., 367.
Regina *v.* Hartington, 16.
v. Wye, 16.
Reid *v.* Tucker, 151.
Reidhar *v.* Berger, 449.
Reifsnyder *v.* Lee, 221.
Reiss *v.* Brady, 418.
Remington *v.* Cady, 158.
Renneker *v.* Davis, 342, 592.
Repine *v.* McPherson,
252, 253, 265, 305, 323
Repley *v.* Severance, 197.
Reyburn *v.* Brackett, 80.
Reynell *v.* Sprye, 541.
Reynolds *v.* Damrell, 423.
v. Horn, 423.
v. Jordan, 403, 437, 438.
v. Simpkins, 416.
Rhine *v.* Danville, 356.
Rhoades *v.* Woods, 281.
Rhodes *v.* Smith, 399.
Rice *v.* Dwight Man. Co., 538.
v. Jerenson, 109.
v. McMartin, 469.
v. Thornton, 417.
v. Wilkins, 281.
Richards *v.* Allen, 199.
v. Craig, 401.
v. Daggett, 145, 185, 187.
v. Donaughey, 80.
v. Griggs, 224.
v. Stephenson, 367.
Richardson *v.* Gurney, 218.
v. Hall, 145, 184, 482.
v. Hickman, 565.
v. Lacey, 356, 527; Whi-
Richmond *v.* Dreyfous, 328. [ting, 196.
Richter *v.* Wise, 89.
Rick *v.* Waters, 203.
Rickert *v.* Snyder, 453.
Ricketts *v.* Henderson, 335.
Riddle *v.* Black, 418
v. Varnum, 162.
Ridgeney *v.* Coles, 276, 315.
Ridgeway *v.* Farr, 252, 253.
v. Smith, 56, 433.
Ridley *v.* Ridley, 315, 320, 323.
Ridlon *v.* Cressey, 527.
Riley *v.* Hirst, 218, 223.
v. Nichols, 78.
Rinchey *v.* Stryker, 145.
Rindge *v.* Green, 228.
Ripley *v.* Gear, 410.
Rippen *v.* Schoen, 200, 376.
Rischert *v.* Kunz, 204.

Risley *v.* Brown, 407, 505.
v. Phœnix Bank, 540.
v. Welles, 197.
Riswick *v.* Davis, 39, 40.
Rittenhouse *v.* Harman, 94.
Ritter *v.* Scannell, 259.
Rivard *v.* Gardner, 274.
Rives *v.* Wibborne, 397.
Rix *v.* Elliott 205.
Rix *v.* Silknitter,
159, 160, 176, 177, 180, 187.
R. L. & M. Works *v.* Kelley, 154.
Roach *v.* Brannon, 59, 60, 113, 455.
v. Chapman, 559.
Robbins *v.* Alley, 40.
v. Cooper, 156.
Roberts *v.* Barry, 514.
v. Carpenter,
284, 285, 314, 322.
v. Drinkard, 203.
v. Dunn,
161, 219, 314, 321, 397, 404.
Robertson *v.* Baker, 198.
v. Beall, 222.
v. Forest, 530, 582, 597.
v. Kinkhead, 265.
v. Lemon, 453.
v. Roberts, 354.
Robinson *v.* Burton, 87, 105.
v. Campbell, 326.
v. Ensign, 161, 219.
v. Mansfield, 145, 159,
160, 185, 186, 286.
v. National Bank of Newberne, 143, 144, 312, 322.
Roche *v.* R. I. Ins. Assoc., 241.
Rochefeller *v.* Roysradt, 421.
Rockwood *v.* Varnum, 292, 494.
Rodega *v.* Perkerson,
159, 184, 186, 188, 323.
Rodman *v.* Musselman, 230, 247, 238.
Rodolph *v.* Mayer, 389.
Rodrigues *v.* Trevino, 212, 474, 483.
Roelfson *v.* Hatch, 89, 321, 331.
Rogers *v.* Abbott, 497.
v. Bonner, 171, 256, 259.
v. Cooper, 105, 106.
v. Dill, 330.
v. Ellis, 99.
Rogers *v.* Fairfield, 177.
v. Gilmore, 177.
Rollins *v.* Clement, 276.
Rollo *v.* Andes Ins. Co., 230.
Romagosa *v.* Nodal, 212, 474.
Ronaldson *v.* Hamilton, 99.
Ronkendorf *v.* Taylor's Lessee, 273.
Rood *v.* Scott, 285, 286.
Rooker *v.* Daniels, 565.
Roosevelt *v.* Kellogg, 39.
Root *v.* Monroe, 421.
Rose *v.* Himely, 336.
v. Whaley, 423.
Rosenberg *v.* Moore, 59.
Rosenbury *v.* Angel, 145.
Rosenfield *v.* Howard, 57.
Rosenthal *v.* Wehre, 62.
Ross *v.* Allen, 236.
v. Clark,
43, 51, 219 222, 233, 600
v. Duval, 326.
v. Edwards, 159.
v. Jenkins, 102.
v. Pitts, 560.
v. Ross, 240, 245.
Roth *v.* Hotard, 223, 225.
Rothermel *v.* Marr, 145, 149.
Roulhac *v.* Rigby, 127.
Rourke *v.* Bullens, 163.
Rouss *v.* Wright, 87.
Rowan *v.* Lamb, 173, 251.
Rowe *v.* Heath, 453.
Rowell *v.* Klein, 264, 267.
Rowell *v.* Powell, 165, 212.
Rowland *v.* Coyne, 394.
v. Plummer, 375, 376, 484.
Rowley *v.* Berrian, 9, 310,
312, 321, 331, 396, 467.
v. Kemp, 471.
v. Rice, 283.
Rudolph *v.* McDonald, 103, 477, 522.
Ruff *v.* Ruff, 521.
Rugg *v.* Minett, 162.
Rundlett *v.* Jordan, 168, 202.
Runlett *v.* Bell, 280.
Runyan *v.* McClellan, 524.
v. Morgan, 91.
Ruppert *v.* Haug,
83, 86, 89, 412, 415, 478.

Russ *v.* Butterfield, 259.
Russell *v.* Clingman, 203.
v. Gregory, 87, 323.
v. Men of Devon, 234.
v. O'Brien, 163.
Rutter *v.* Boyd, 374.
Ruttie *v.* Green Bay & Minn. R. R. Co., 86, 87, 89.
Ryan *v.* Burkham, 267.
Ryder *v.* Flanders, 276, 315.
Ryland *v.* Green, 17.

S.

Sabin *v.* Cooper, 205.
Saco *v.* Hopkinton, 137, 423.
Saddler *v.* Prairie Lodge, 361.
Saddlesvene *v.* Arms, 63.
Saffaracus *v.* Bennett, 274.
Saffaraus *v.* Terry, 275.
Sagely *v.* Livermore, 281.
Saller *v.* Ins. C. of North America, 371.
Saddler *v.* Hudson, 328.
Sample *v.* Coulson, 264.
Samuel *v.* Agnew, 209, 557.
v. Brite, 117.
Sanborn *v.* Royce, 155, 568.
Sandburg *v.* Papineau, 520.
Sandel *v.* George, 40, 46.
Sanders *v.* Canett, 77.
v. Hamilton, 264, 536.
v. Hughes, 113, 450.
Sanderson *v.* Edwards, 177, 280, 314.
Sands *v.* Lynham, 538, 543.
Sanford *v.* Boring, 177, 314, 323.
v. Pond, 261.
v. Wheeler, 495.
Sangster *v.* Butt, 562.
Sangster *v.* Commonwealth, 145, 185, 188.
Santo *v.* State, 560.
Sappington *v.* Oeschli, 165.
Sargeant *v.* Helmbold, 63.
Sargent *v.* Carr, 159.
Sarpy *v.* New Orleans, 453.
Saulter *v.* Butler, 422.
Saunders *v.* Bartlett, 525.
Saunders *v.* Columbus Life Ins. Co., 21, 172, 173, 251, 252.
Savage *v.* Aiken, 466.
Savery *v.* Browning, 165.
Sawyer *v.* Arnold, 86, 91.
v. Curtis, 264, 567.
v. Merrill, 188.
v. Thompson, 227.
Sayward *v.* Drew, 203.
Scamahorn *v.* Scott, 353.
Scanlon *v.* O'Brien, 20, 402, 409, 437.
Scarborough *v.* Malone, 21, 348, 399, 509, 567, 581.
Schacklett's Appeal, 21.
Schall *v.* Bly, 434.
Schatgill *v.* Bolton, 525.
Scheib *v.* Baldwin, 182.
Schell *v.* Leland, 77.
Schenck *v.* Griffin, 463.
Schepler *v.* Gariscan, 159.
Scherr *v.* Little, 150.
Schindler *v.* Smith, 193.
Schlaeter *v.* Raymond, 213.
Schlater *v.* Broaddus, 438.
Schlatter *v.* Hunt, 434.
Schmidlapp *v.* Currie, 59.
Schmidt *v.* Bickenbach, 444.
v. Brown, 400.
v. Colley, 477.
Schneider *v.* McFarland, 315.
Schnell *v.* Chicago, 275, 321, 331, 333.
Schoolcraft *v.* Thompson, 548.
School Dist. *v.* Gage, 235, 236.
School District *v.* Taylor, 502.
Schooner Bolina *v.* Cargo, 272, 315.
Schoppenhast *v.* Ballman, 413, 503, 560, 565.
Schulenburg *v.* Farwell, 71.
Schuyler *v.* Sylvester, 470.
Schwab *v.* Mabley, 393.
Schwinger *v.* Hickok, 538.
Scofield *v.* Bell, 160.
v. Bradlee, 294.
Scorpion S. M. Co. *v.* Marsano, 275.
Scott *v.* Davis, 177, 314, 321.
v. Hawkins, 361, 365.
v. Macy, 127.
v. Manchester Print Works, 171.
v. Shearman, 272, 315.
Scrimpf *v.* McArdle, 118.

Scruggs *v.* Blair, 41.
Scrugham *v.* Carter, 525.
Seaman *v.* Hicks, 543.
Searcy *v.* Platte County, 420.
Sears *v.* Hanks, 525.
Seaver *v.* Fitzgerald, 69.
Seay *v.* Greenwood, 451.
Security Loan Association *v.* Weems, 373.
Seekins *v.* Goodale, 144.
Seeley *v.* Brown, 106, 425.
Seely *v.* Board of Education, 236.
Seers *v.* Blakesly, 423.
Seibert *v.* Switzer, 70, 71, 529.
Selheimer *v.* Elder, 248.
Sellick *v.* Twesdall, 91.
Selz *v.* Atkinson, 386.
v. Belden, 433.
Semmes *v.* United States, 476.
Senecal *v.* Smith, 113.
Sessions *v.* Stevens, 562.
Sewall *v.* Mattoon, 280.
Seward *v.* Heflin, 367, 562, 564.
Sewell *v.* Savage, 492, 582, 597.
Sexey *v.* Adkinson, 145.
Sexton *v.* Amos, 358, 367, 373.
v. Rhames, 275.
Seymane *v.* Gresham, 179.
Seymour *v.* Kramer, 197.
v. Newton, 159.
Shaddock *v.* Marsh, 103, 430, 433.
Shaffer *v.* Mason, 63.
Shannon *v.* Blum, 153.
Sharp *v.* Baird, 182, 263.
v. Clark, 221, 597.
Sharpe *v.* Hunter, 445.
Sharpless *v.* Zeigler, 92.
Sharts *v.* Awalt, 503.
Shaver *v.* White, 525.
Shaw *v.* Bunker, 358, 362, 373.
v. Holmes, 148.
v. Lawton, 280.
v. O'Brion, 286.
Shealey *v.* Toole, 361, 521.
Shedd *v.* McConnell, 412.
Sheedy *v.* Second Nat. Bank, 27, 205, 365, 484.
Sheehan *v.* Marston, 382.
Sheets *v.* Culver, 206.
Sheffield *v.* Gay, 93.
Sheirburn *v.* Cordova, 326.
Sheldon *v.* Hinton, 375, 376.
v. Litchfield County, 234.
v. Newton, 329.
v. Stewart, 434.
v. Wright, 272, 274, 276, 315
Shelly *v.* Smith, 204.
Shepard *v.* Shepard, 495.
Sheppard *v.* Collins, 398.
v. Powers, 354.
Shermer's Appeal, 17.
Sherrill *v.* Beach, 50, 55.
v. Bench, 105, 106.
Sherry *v.* Dean, 315.
Shetler *v.* Thomas, 503, 560, 565.
Shewell *v.* Keen, 223.
Shield *v.* Dothard, 106.
Shinn *v.* Holmes, 17.
v. Zimmerman, 597.
Shipman *v.* Woodbury, 38, 45, 58
Shipp *v.* Davis, 99.
Shirley *v.* Byrnes, 9, 20, 312, 322, 403
v. Owners, 27.
Shirley's Admr. *v.* Jones, 542, 543.
Shivers *v.* Wilson, 357.
Shockley *v.* Bulloch, 77, 80.
v. Davis, 117, 422.
Shoe & Leather Bank *v.* Mechanics Bank, 414
Shove *v.* Dow, 486.
Shrewsbury *v.* Pearson, 428, 432.
Shriver *v.* Harbaugh, 148.
Shriver's Lessee *v.* Lynn, 329, 330, 331, 338
Shrove *v.* Dow, 493.
Shroyer *v.* Nickell, 538.
v. Richmond, 329.
Shufelt *v.* Cramer, 214, 387.
Shuff *v.* Morgan, 184.
Shugart *v.* Orr, 47, 50.
Shultz *v.* Morrison, 451.
Shumway *v.* Rutter, 163, 188.
Shuster *v.* Finan, 393.
Sibley *v.* Brown, 185.
v. Fernie, 158.
v. Leffingwell, 212, 495.
v. Story, 284, 285, 286.
v. Waffle, 276, 315.

Sigourney *v.* Eton, 493.
v. Larned, 501, 524, 544.
Silverwood *v.* Bellar, 199.
Sime's Estate, 223, 226.
Simmon *v.* Worthington, 545.
Simon *v.* Shelter, 84, 114.
v. Stetter, 84, 433.
Simonds *v.* Harris, 601.
Simons *v.* Jacobs, 43, 51, 432.
Simpkins *v.* Malatt, 94.
Simpson *v.* Burch, 69.
v. Harry, 196.
v. Knight, 119.
Sims *v.* Goettle, 477.
v. Jacobson, 414.
Sinclair *v.* Tarbox, 281.
Singer Manuf. Co. *v.* Mason, 436.
Singer *v.* Townsend, 361.
Singleton *v.* Wofford, 84.
Sir John Parrot's Case, 597.
Sitzman *v.* Pacquette, 276, 315.
Skiff *v.* Stuart, 85, 91, 92.
Skillman *v.* Bethany, 159.
Skipper *v.* Foster, 597.
Skowhegan Bank *v.* Farrar, 168, 195.
Slaughter *v.* Bevans, 109.
Sledge *v.* Lee, 446.
v. McLaren, 113, 456.
Sleet *v.* Williams, 86, 102.
Sloan *v.* Bangs, 58.
v. Forse, 274.
v. McCracken, 445.
Small *v.* Hutchins, 284.
Smart *v.* Batchelder, 162, 281.
Smiley *v.* Samson, 329.
Smith *v.* Ainscow, 522.
v. Blatchford, 564.
v. B. C. & M. Ry. Co., 228.
v. Bradstreet, 21.
v. Canfield, 545.
v. Chadwick, 166, 525.
v. Chapman, 202, 361.
v. Chicago, etc., R. R. Co., 358.
v. Cicotte, 148, 149.
v. Clarke, 367.
v. Curtiss, 260.
v. Cutchen, 335, 338.
v. Davis, 77, 87, 415, 478.
Smith *v.* Dickson, 344, 522, 560.
v. Eakin, 113.
v. Easton, 27, 56, 321, 432.
v. Engle, 329.
v. Fargo, 398.
v. Flanders, 384.
v. Foster, 100.
v. Gottinger, 480.
v. Griffin, 513.
v. Kennebec, &c. R. R. Co., 168.
v. Luce, 77, 87, 90, 93.
v. McCutchen, 305, 322, 355.
v. Mulhern, 309.
v. Orser, 177.
v. Osgood, 150.
v. Pearce, 422.
v. Reese River S. & M. Co., 541.
v. Rice, 330.
v. Richards, 541.
v. Sanborn, 185.
v. Scott, 510.
v. Sprague, 453.
v. Story, 22, 38, 43, 45, 113, 444, 445.
v. Wells, 538, 542.
Smith & Co. *v.* Zuchee, 499.
Smith's Case, 156.
Smoot *v.* Eslava, 564.
v. Hart, 238.
Smyth *v.* Anderson, 224.
Snell *v.* Ins. Co., 542.
Snook *v.* Snetzer, 204.
Snow *v.* Sheldon, 158.
Somer *v.* Brewer, 502.
Somers *v.* Emerson, 164.
v. Losey, 168, 217.
Somerville *v.* Somerville, 39.
Soule *v.* Chase, 272, 274.
South Bend Bank *v.* Gandy, 200.
S. C. R. R. Co. *v.* McDonald, 35, 239.
S. C. R. R. Co., *v.* People's Saving Institution, 250.
Southern Bank *v.* McDonald, 487.
Spalding *v.* Imlay, 233.
v. Simms, 45, 47, 416.
Sparhawk *v.* Cloon, 199.
Sparks *v.* Zebley, 58.

Spaulding *v.* Wallett, 22, 444.
Speak *v.* Kinsey, 205.
Spear *v.* King, 120, 422.
Spears *v.* Chapman, 366, 377.
Speed *v.* Brown, 238.
Spencer *v.* Blaisdell, 165, 168.
v. Deagle, 57.
v. Rogers Locomotive Works, 416.
v. School District, 235, 236.
Spengler *v.* Davy, 455, 456.
Speyer *v.* Ihmels, 480, 482.
Spiegelberg *v.* Sullivan, 27, 129, 322.
Spiers *v.* Halstead, 77.
Splahn *v.* Gillespie, 264, 267.
Sprague *v.* Steamboat Nav. Co., 244.
Spring *v.* Ins. Co., 59.
Sproule *v.* McNulty, 213.
Squair *v.* Shea, 228.
St. Amant *v.* Beixcedon, 430, 431.
St. Clair *v.* Cox, 8, 130, 247.
St. George *v.* O'Connell et al., 176.
St. Louis P. Ins. Co. *v.* Cohen, 35.
St. Louis *v.* Regenfuss, 216.
Staats *v.* Bristow, 155.
Staats *v.* Executors of Ten Eyck, 453.
Stacy *v.* Stichton, 99, 419.
Stadler *v.* Moors, 214, 387.
Staggers *v.* Washington, 106.
Staniels *v.* Raymond, 212, 293.
Stanley *v.* Arnow, 389, 390.
v. Ogden, 63.
v. Perry, 167.
Stanton *v.* Holmes, 233.
Staphouse *v.* County of New Haven,
St. Jos. Township *v.* Rogers, 325. [234.
Staple *v.* Bird, 168.
Staples *v.* Staples, 218, 221, 223.
Starbuck *v.* Murray, 336.
Stark *v.* Brown, 315, 417.
Starke *v.* Marshall, 87.
Starr *v.* Lyon, 118, 127, 421, 447.
v. Mayer, 69.
v. Moore, 280.
State *v.* Baldwin, 281.
v. Brownlee, 213.
v. Conover, 552.
v. Cornelius, 27, 177, 314, 323.
v. Ely, 329.
State *v.* Fitzpatrick, 552.
v. Foster, 144.
v. Gachenheimer, 329.
v. Gaillard, 541.
v. Jennings, 551, 566.
v. Long, 552.
v. Manly, 166, 513, 521.
v. Metzger, 331.
v. Miller, 513.
v. Moore, 145, 188.
v. Morris, 49, 95.
v. Penner, 263.
v. Penny, 16.
v. Sandford, 165; Sutterfield, 325.
v. Thomas, 449.
v. Wheeler, 560.
v. Williams, 445.
State Bank *v.* Hinton, 447.
State Bank *v.* Morris, 126.
State Bank of Fenton *v.* Whittle, 434.
State of Rhode Island *v.* State of Mass., 329.
State ex. rel. Kahoon *v.* Krumpus, 165, 166.
State ex. rel. *v.* Baldwin, 567.
Staunton *v.* Holmes, 219.
Steamboat Raritan *v.* Smith, 558.
Farmer *v.* McCraw, 416.
Napoleon *v.* Etter, 117, 422.
Stearns *v.* Dean, 159, 186.
Stebbins *v.* Fish, 361.
Stedman *v.* Vickery, 197.
Steele *v.* Dodd, 55.
Steers *v.* Morgan, 530.
Steffons *v.* Wanbosker, 485, 492.
Stein *v.* Bennett, 17.
Steiner *v.* Central R. R. Co., 359.
Stephen *v.* Thayer, 586.
Stephens *v.* Allmen, 123.
Stephens *v.* Green County Iron Co., 437.
Stephenson *v.* Walden, 160.
Sterling City Mining Co. *v.* Cock, 446.
Sterrett *v.* Howarth, 258.
Steuben Co. Bank *v.* Alberger, 83, 94, 413, 415, 431, 478.
Stevens *v.* Able, 22, 441.

Stevens *v.* Bell, 193.
v. Brown, 528.
v. Dillman, 208.
v. Middleton, 92.
v. Perry, 170, 205.
v. Phœnix Ins. Co., 246.
v. Wrisley, 499.
Stevenson *v.* McLean, 144.
v. Robbins, 118, 420, 447, 450.
Stewart *v.* Board, etc., 272, 315.
v. Clark, 82.
v. Cole, 56.
v. Dobbs, 408.
v. Heidenheimer, 80, 104.
v. Katz, 93, 96, 119.
v. Marquis of Bute, 168.
v. Porter, 342.
Stickney *v.* Davis, 184.
Stienle *v.* Bell, 69.
Stiles *v.* Davis, 281, 295, 582, 592.
Stillman *v.* Isham, 219, 233.
Stimpson *v.* Malden, 561.
Stimson *v.* Ward, 284.
Stinson *v.* Caswell, 196, 204.
v. Clark, 162.
Stinton *v.* Steamboat Roberts, 559.
Stockett *v.* Nicholson, 331.
Stockley *v.* Wadman, 145, 582.
Stockton *v.* Douney, 27, 177, 251.
Stockwell *v.* McCracken, 355.
Stoddart *v.* McMahon, 173, 251 252, 253.
Stokes *v.* Potter, 100.
Stonach *v.* Glessner, 391, 549.
Stone *v.* Boone, 418, 432.
v. Dean, 168, 206.
v. Magruder, 357.
v. Swift, 456.
Storm *v.* Adams, 219.
v. Cotzhausen, 380.
Story *v.* Elliott, 139.
v. Kemp, 367.
Stouffer *v.* Niple, 49.
Stoughton *v.* Pasco, 495.
Stout *v.* Leonard, 36, 37, 39.
v. Woods, 560.
Stowe *v.* Buttrick, 285, 287.
v. Meserve, 167.
Stratton *v.* Brigham, 38, 45, 59.
v. Ham, 224.
Straus *v.* Wessel, 164.
Strauss *v.* R. R. Co., 203.
Street *v.* Smith, 249.
Stricker *v.* Kelly, 333.
Strickland *v.* Martin, 177.
Strode *v.* Patton, 538, 542.
Strong *v.* Hollon, 361, 379, 385.
Strout *v.* Bradbury, 161, 219, 281.
Struthers *v.* McDowell, 105, 106.
Stuart *v.* Lacoume, 401.
v. West, 203.
Sturtevant *v.* Robinson, 561.
Sublett *v.* Wood, 28, 432.
Succession of Durand, 42.
Sueterlee *v.* Sir, 69.
Sullivan *v.* Blackwell, 331.
v. Fugate, 87, 89.
v. Langley, 206, 351, 377.
Surty *v.* Skilton, 47.
Sutherland *v.* Peoria Bank, 177, 250.
Suydam *v.* Huggeford, 490, 581.
v. Williamson, 326.
Swager *v.* Pierce, 63.
Swain *v.* Mizner, 180.
Swan *v.* McCracken, 189, 565.
v. O'Fallon, 427, 430.
Swan *v.* Summers, 196.
Swaney *v.* Hutchins, 37, 39, 42.
Swann *v.* Broome, 138.
Swartz *v.* Lawrence, 404, 469.
Swayze *v.* Doe, 274.
Sweet *v.* Reed, 57, 196, 205, 370, 374.
Sweezey *v.* Bartlett, 416, 430, 432.
Swett *v.* Brown, 292, 295, 342, 592.
v. Sprague, 274.
Swift *v.* Crocker, 477.
v. Tyson, 326.
Switzwer *v.* Carson, 430.
Sydnor *v.* Tolman, 93.

T.

Tabor *v.* Armstrong, 591.
v. Nye, 203.
v. Van Vranken, 214, 372.
Taffts *v.* Manlove, 165, 492, 582, 595.
Taintor *v.* Williams, 177, 288, 314, 322.

Talbot *v.* Harding, 595.
v. Pierce, 137, 431.
Talcott *v.* Rosenberg, 85, 91, 95, 258.
Talemon *v.* Cardenas, 46.
Tallman *v.* Bigelow, 90, 93.
v. McCarty, 391, 549.
Talmie *v.* Thompson, 324.
Tams *v.* Bullitt, 562.
Tappan *v.* Harrison, 586.
Tarbell *v.* Bradley, 63, 416.
Tarkinton *v.* Broussard, 75, 425.
Taylor *v.* Burlington & Mo. R. R. Co., 240.
v. Carryl, 219, 554.
v. Collins, 562.
v. Echford, 495.
v. Emery, 261, 486.
v. Gillian, 168, 222.
v. Jones, 185.
v. Kain, 358.
v. Knox, 38, 44, 53.
v. Kuhuke, 54.
v. McDonald, 156.
v. Mixter, 172, 256.
v. Myers, 53.
v. Richards, 119, 428, 429.
v. Sutt, 120.
v. Taylor, 405, 438.
v. Thompson, 324.
Teal *v.* Lyons, 113, 455.
Temple *v.* Cochran, 45, 450.
Ten Brock *v.* Pendleton, 418.
Tennant *v.* Battey, 21, 509.
Terrill *v.* Rogers, 10.
Terry *v.* Lindsey, 224.
v. Sisson, 206, 491.
Tevis *v.* Hughes, 127, 431, 425.
Thatcher *v.* Goff, 122.
v. Powell, 330.
Thayer *v.* Sherman, 218, 223.
v. Southwick, 202.
v. Tyler, 219, 236.
Theall *v.* Disbrow, 495.
The Archer, 410.
The Blanche Page, 405.
The Caroline, 99.
The C. F. Ackerman, 405.
The Daniel *v.* Gardner, 85.
The Eenroom, 474.
The Emily and Caroline, 99.
The Excelsior, &c. Co. *v.* Lukens, 511, 513.
The Floyd Co. Ag. and Mechan. Association *v.* Tompkins, 394.
The Frances, 474.
The Independent, 280.
The Lafayette Ins. Co. *v.* Friend, 336.
The Marianna, 474.
The Martha C. Burnite, 410.
The Mary, 272.
The Merino, 99.
The Monte Allegre, 542.
The Ohio & Miss. &c. Co. *v.* Alvey, 503.
The Oliver Jordan, 219.
The People *v.* Barnet, 394.
v. Bradley, 394.
The People ex. rel. Townsend & Alexander *v.* Cass Circuit Judge, 374.
The People *v.* Hubbard, 179.
The People's Ferry *v.* Beers, 559.
The Robert Fulton, 219.
The Samuel, 99.
The State ex. rel. *v.* Manly, 510.
v. Boston, &c. R. R. Co., 228.
ex. rel. *v.* Miller, 510.
The Steamboat Orleans *v.* Phœbus, 559.
The Steamboat Rover *v.* Stiles, 558.
The Tobago, 474.
The Virgin, 405.
Theirman *v.* Vahle, 88, 89, 97.
Thelusen *v.* Smith, 472.
Thole *v.* Watson, 511.
Thomas *v.* Sprague, 374, 358.
Thompson *v.* Allen, 342, 561, 592.
v. Arthur, 25, 118, 422, 447.
v. Baker, 286, 287, 288, 524.
v. Brown, 161, 219.
v. Butler, 558.
v. Carper, 63.
v. Culver, 416, 430.
v. Eastburn, 251.
v. Fisehesser, 374.
v. Gould, 538.
v. Marsh, 161, 219.

Thompson *v.* Rose, 159.
v. Silvers, 191, 342, 528, 529.
v. Steamboat Morton, 272, 315.
v. Stewart, 199.
v. Thomas, 331, 335.
v. Tolmie, 329, 330.
v. Turner, 396.
v. Wallace, 527.
v. Whitman, 336, 337, 338, 339.
Thorn *v.* Woodruff, 223, 344.
Thorndike *v.* Bath, 163.
v. De Wolf, 597.
Thornton *v.* Mulquinne, 276.
v. Winter, 252.
Thorp *v.* Elliott, 203, 366.
v. Preston, 203, 241, 366.
Threshing Machine Co. *v.* Miracle, 224.
Thurneyssen *v.* Vouthier, 38, 50.
Thurston *v.* Huntington, 486, 493.
Tibbetts *v.* Tilton, 16.
v. Townsend, 44.
Tichenor *v.* Coggins, 505.
Tiffany *v.* Glover, 265.
v. Lord, 420.
Tignor *v.* Wadley, 23, 67.
Tilden *v.* Metcalf, 234.
Tillinghast *v.* Johnson, 223, 342, 595.
Tilton *v.* Cofield, 532, 545.
Tim *v.* Smith, 414, 415, 478.
Timmons *v.* Garrison, 181.
Tindell *v.* Wall, 342, 592.
Tingley *v.* Bateman, 227.
v. Dolby, 170.
Tirrell *v.* Canada, 168.
Titcomb *v.* Seaver, 196.
Tobey *v.* Claflin, 545.
Todd *v.* Birdsall, 237.
Toland *v.* Sprague, 312, 392.
Tomlinson *v.* Collins, 285, 286.
Toledo R. R. Co. *v.* Reynolds, 514, 527.
Toland *v.* Sprague, 328.
Tomlinson *v.* Stiles, 145.
v. Warner, 456.
Tommey *v.* Gamble, 100, 102, 106.
Torrance *v.* Botton, 538, 541.
Torrey *v.* Otis, 281, 284.
Totty *v.* Donald, 545.
Toulmin *v.* Lesesne, 256.
Town *v.* Tabor, 260.
Towne *v.* Griffith, 196.
v. Leach, 205.
Towns *v.* Pratt, 187.
Townsend *v.* Libbey, 353.
v. Newell, 159, 160.
Tracy *v.* Hornbuckle, 236.
v. McGarty, 372.
Train *v.* Wellington, 288.
Transit Co. *v.* McRea, 451.
Trapnall *v.* McAffee, 448, 451.
Travis *v.* Tartt, 205, 344.
Treat *v.* Barber, 185.
Tredwell *v.* Roscoe, 525.
Trellson *v.* Green, 21.
Trenton Banking Co. *v.* Haverstick, 82, 240.
Triebel *v.* Colburn, 222, 237.
Trieber *v.* Blacher, 184.
Trombly *v.* Clark, 598.
Trowbridge *v.* Means, 598.
v. Sickles, 86, 101.
v. Weir, 121.
Trow Printing Co. *v.* Hart, 83, 106, 414.
Troy *v.* Sargeant, 158.
Trudeau *v.* McVicar, 174.
Trustees of School *v.* Tatman, 236.
Tucker *v.* Adams, 450.
v. Atkinson, 599.
v. Butts, 223.
v. Byars, 251.
v. Clisby, 199.
v. Vandemark, 502.
v. White, 107.
Tufts *v.* Carradine, 266, 486.
v. McClintock, 145, 184.
Tukey *v.* Smith, 281.
Tunstall *v.* Means, 598.
Tunstall *v.* Worthington, 344.
Tupper *v.* Cassell, 216.
Turbill's Case, 133.
Turner *v.* Armstrong, 202.
v. Bank of America, 330.
v. Burnell, 216.
v. Fendall, 161, 219, 221.

Turner *v.* Killian, 551.
v. Lytle, 22, 185, 441, 482.
v. McDaniel, 88, 97.
v. Miller, 453.
Turpin *v.* Coates, 372.
Tuxworth *v.* Moore, 163.
Twombly *v.* Hunnewell, 281.
Tyler *v.* His Creditors, 471.
v. Safford, 397, 433.
v. Ulmer, 280.
Tyrrell's Heirs *v.* Rountree, 509, 523.
Tyson *v.* Lansing, 127.

U.

Ullmeyer *v.* Ehrmann, 364.
Ulmer *v.* Hiatt, 549.
Underhill *v.* Calhoun, 238.
Underwood *v.* Robinson, 144.
Union Bank *v.* U. S. Bank, 35.
Union Lumbering Co. *v.* Tronson, 184.
Union Slate Co. *v.* Tilton, 66, 67.
United States *v.* Ames, 405.
v. Arredondo, 324, 329, 336, 539, 543.
v. Brown, 118.
v. Gordon, 118.
v. Graff, 179.
v. Hawkins, 472.
v. Hine, 551, 566.
v. Langton & Trustees,
v. McDonald, 281. [591.
v. Morgan, 118.
v. Mosely, 410.
v. Nelson, 398.
v. Reid, 326.
v. Robertson, 216.
v. Ruggles, 457.
v. State Bank, 539.
v. The Little Charles, '99.
v. Vaughan, 211, 216.
v. Williams, 525.
v. Yates, 396.
Upper Mississippi Transportation Co. *v.* Whitaker, 391, 549.
Upton *v.* Craig, 181.
Utley *v.* Smith, 281.

V.

Vairon *v.* Edmonson, 274, 275, 321, 331.
Vallee *v.* Dumergus, 277, 304.
Valle's Heirs *v.* Fleming's Heirs, 538.
Van Alstyne *v.* Erwine, 100.
Van Amee *v.* Jackson, 168.
Van Arsdale *v.* Krum, 126, 127, 477.
Van Kirk *v.* Wilds, 77, 91.
Van Loan *v.* Kline, 21, 509, 523.
Van Loon *v.* Lyons, 92, 420.
Van Norman *v.* Judge of Jackson Circuit, 9, 27, 53, 85.
Van Pelt *v.* Littler, 145, 188.
Van Rensselaer *v.* Kearney, 326, 543.
Van Riswick *v.* Lamon, 222.
Van Staphorst *v.* Pierce, 212.
Van Vichten *v.* Paddock, 135.
Van Wyck *v.* Hardy, 69.
Vanderford *v.* Van Valkenberg, 17.
Varnell *v.* Speer, 250, 350.
Varner *v.* Radcliff, 390, 393.
Veazie *v.* Somerby, 163.
v. Williams, 543.
Veiths *v.* Hagge, 449.
Vertrees *v.* Hicks, 381.
Very *v.* McHenry, 16.
Victor *v.* Hartford Ins. Co., 202.
Vienne *v.* McCarty, 431, 433.
Vierbeller *v.* Brutto, 223, 226.
Vilas *v.* Reynolds, 174.
Vincent *v.* Huddleston, 21.
Vinton *v.* Bradford, 161, 219.
v. Mead, 412.
Violet *v.* Tyler, 258.
Vogel *v.* Reynold's Case, 506.
Von Beck *v.* Shuman, 548.
Voorhies *v.* Bank of the U. S., 324, 329, 336, 532.
v. Hoagland, 157, 427.
v. Sessions, 161, 232.
Vorse *v.* Phillips, 22, 443, 450, 451, 457
Vose *v.* Cockroft, 409, 436.
v. Handy, 274.

W.

Waddell *v.* Cook, 525.
Wadleigh *v.* Jordan, 367.
Wadsworth *v.* Cheeny, 105.
v. Walliker, 281, 287.
Waffer *v.* Goble, 71, 77.
Wagner *v.* Stocking, 22, 441.
Waite *v.* Osborne, 223.
Wakefield *v.* Fairman, 185.
Walbridge *v.* Hall, 330.
v. Spalding, 120, 121.
Walcott *v.* Hendrick, 43.
v. Keith, 188, 295, 342, 592, 593.
Walden *v.* Dudley, 144.
Waldman *v.* O'Donnell, 238.
Waldron *v.* Wilcox, 209, 227.
Wales *v.* City of Muscatine, 238, 240.
Walke *v.* McGehee, 202.
Walker *v.* Bank of Mobile, 115.
v. Barrelli, 42, 129, 321.
v. Cook, 235.
v. Cottrell, 18, 20, 276, 309, 317, 321, 327, 332.
v. Day, Griswold & Co., 321.
v. Detroit, Grand Haven, etc. R. R. Co., 196.
v. Fitts, 157, 187.
v. Foxcroft, 161, 219, 281.
v. Gibbs, 203.
v. Gilbert, 495.
v. Roberts, 478, 548.
v. Turner, 330.
v. Woods, 144.
v. Zorn, 526.
Walkins *v.* Cawthorn, 314.
Wall *v.* Pulliam, 283, 314, 321.
Wallace *v.* Barker, 176.
v. Breeds, 162.
v. Castle, 40.
v. Finberg, 449.
v. Forrest, 145, 464.
v. Galloway, 156, 157.
v. Lawyer, 222, 233, 237.
v. McConnell, 523.
Wallach *v.* Sippilli, 87.
Wallis *v.* Forest, 595.
v. Murphy, 92.
Wallis *v.* Wallace, 86, 91, 119.
Walser *v.* Thies, 456.
Walters *v.* Monroe, 319.
Walts *v.* Nichols, 487.
Wambold *v.* Vick, 145.
Ward *v.* County of Hartford, 233, 234, 237.
v. Howard, 70, 477.
v. Lamson, 201.
v. Lewis, 211.
v. McKenzie, 21, 305, 321.
Warden *v.* Adams, 496, 524.
Warder *v.* Thrilkeld, 49, 51, 55.
Wardle *v.* Briggs, 367.
Wardwell *v.* Jones, 235.
Ware *v.* Gowen, 201.
v. Todd, 86, 91, 95, 469.
Warne *v.* Kendall, 207.
Warner *v.* Everett, 53, 85.
v. Perkins, 206.
v. Webster, 315, 322, 333.
Warren *v.* Booth, 243.
v. Buckminster, 162.
v. Copelin, 565.
v. Leland, 281, 284.
v. Lord, 106, 410, 425.
v. Purtell, 105, 141.
Warren Manuf. Co. *v.* Etna Ins. Co. 335.
Warwick *v.* Chase, 63.
Washburn *v.* Bank of Bellows' Falls, 525.
v. Clarkson, 386.
v. N. Y., etc. Co., 357.
Wasson *v.* Cone, 128, 391, 405, 507.
v. Linster, 260.
Waterhouse *v.* Bird, 285.
v. Smith, 177, 260, 314, 322.
Waterman *v.* Treat, 285.
Watkins *v.* Cason, 564.
v. Cawthorn, 285.
v. Field, 342, 595.
v. Stevens, 131, 199.
v. Wallace, 77, 79, 91.
Watson *v.* Kane, 374.
v. Kennedy, 450.
v. Pierpont, 37, 39, 43.
v. Simpson, 433.

Watson *v.* Todd, 161, 219, 221.
v. Watson, 144.
Watt *v.* Carnes, 84.
Watts *v.* Harding, 84.
v. Robertson, 464.
v. Shropshire, 448.
Wayman *v.* Southard, 326.
Waynant *v.* Dodson, 507.
Waxelbaum *v.* Paschal, 27, 89, 323.
Weaver *v.* Ashcroft, 525.
v. Davis, 222, 223.
v. Hayward, 89.
v. Roberts, 268.
v. Wood, 280, 281.
Webb *v.* Edwards, 528.
v. Lea, 354.
v. McCauley, 222, 233.
v. Peale, 199.
Webber *v.* Doran, 366.
Weber *v.* Weitling, 39.
Webster *v.* Adams, 560.
v. Parsons, 330.
v. Reid, 309, 336, 338.
v. Steele, 202, 519.
Wehle *v.* Spellman, 407.
Weiller *v.* Schreiber, 54, 58.
Weimeister *v.* Manville, 92.
Welch *v.* Gurley, 223.
Weller *v.* Hawes, 451.
Wellover *v.* Soule, 141, 205.
Wells *v.* American Express Co., 342, 344, 355.
v. Baldwin, 558.
v. Banister, 196.
v. Danford, 412.
v. Detroit, 9.
v. Gurney, 179.
v. Hawes, 199.
v. Parker, 79, 88.
v. St. Dizier, 100, 434.
v. The People, 38, 42.
Welsh *v.* Joy, 256, 524.
Wendell *v.* Pierce, 161, 218, 222, 235.
Wentworth *v.* Weymouth, 565.
v. Whittemore, 203.
Wentzler *v.* Rose, 102.
Wescott *v.* Archer, 27, 269, 322, 325.
West *v.* Platt, 206, 491.
West Phila. Bank *v.* Dickson, 505.
West River Bank *v.* Gorham, 161.
Western R. R. Co. *v.* Thornton, 243.
Westervelt *v.* Lewis & Tooker, 8, 310, 312.
v. Pinckney, 187.
West Phila. Bank *v.* Dickson, 407.
West Tenn. Agricultural Association *v.* Madison, 83.
Wetherill *v.* Flanagan, 202.
Wetherwax *v.* Varne, 83, 96.
Wetmore *v.* Daffin, 83, 121.
Wetter *v.* Rucker, 562.
Wharton *v.* Conger, 92, 251, 403, 437.
Wheaton *v.* Sexton, 324.
Wheeler *v.* Bowen, 224.
v. Cobb, 44.
v. Degnan, 38, 46, 427.
v. McDill, 399.
v. Slavens, 420.
v. Smith, 221.
Wheelock *v.* Lee, 390.
Whidden *v.* Drake, 238.
Whipple *v.* Cass, 477.
v. Robbins, 242, 355, 367.
Whitaker *v.* Sumner, 172.
Whitcomb *v.* Woodworth, 499.
White *v.* Casey, 84, 361.
v. Coleman, 214.
v. Crow, 532.
v. Cutter, 161.
v. Dunn, 204.
v. Featherstonhaugh, 412.
v. Floyd, 467, 470.
v. Jenkins, 196, 202.
v. Jones, 330, 525.
v. Ledyard, 226.
v. Leszynsky, 58.
v. Lynch, 98.
v. Madison, 391.
v. Morton, 187.
v. Stanley, 95.
v. White, 200, 294.
v. Williams, 56.
v. Wilson, 56, 428.
v. Woodward, 525.
v. Wyley, 448, 455, 456.
Whitehead *v.* Henderson, 345, 361.
Whiteside *v.* Oakman, 416.
Whiting *v.* Budd, 389, 426.

Whitney *v.* Brunette, 78, 105, 546, 548.
v. Butterfield, 138, 183, 566.
v. Farwell, 285, 286, 287.
v. Ladd, 281.
v. Lehmer, 517.
v. Munroe, 218.
v. Silver, 276.
Whittenberg *v.* Lloyd, 142, 322.
Whittier *v.* Smith, 281.
Whorton *v.* Morayne, 330.
Wicker *v.* Scofield, 89.
Wickes *v.* Caulk, 331.
Widgery *v.* Haskell, 179.
Wight *v* Warner, 77.
Wigwall *v.* Union C. & M. Co., 562.
Wilbraham *v.* Snow, 280.
Wilcox *v.* Clement, 214, 387.
v. Jackson, 336, 338.
v. Mills, 216.
Wilcoxen *v.* Miller, 524.
Wild *v.* Ferguson, 230.
Wilder *v.* Bailey & Trustee, 220.
v. City of Chicago, 329.
v. Holden, 251.
v. Shea, 243, 366, 372.
v. Weatherfield, 595.
v. Weatherhead, 342, 489, 597.
Wilds *v.* Blanchard, 176.
Wiley *v.* Aultman, 81, 83.
v. Bennett, 84, 103
v. Moor, 398.
v. Pratt, 394.
v. Sledge, 156.
v. Tranwick, 456.
Wilhelmi *v.* Haffner, 376.
Wilke *v.* Cohn, 80, 323.
v. Jones, 9, 27, 312, 322, 513.
Wilkenson *v.* Hall, 367.
Wilkins *v.* Tourtellott, 87, 182.
Wilkinson *v.* Leland, 330.
Will *v.* Whitney, 183.
Willard *v.* Sheafe, 203.
v. Sperry, 251.
Willet *v.* Eq. Ins. Co., 227.
Willets *v.* Ridgeway, 510, 513.
Williams *v.* Babbit, 259.
v. Barrow, 117, 118.
v. Blunt, 330, 421.
v. Boardman, 233, 235.
Williams & Bruce *v.* Stewart, 392, 393.
v. Cheesebrough, 264.
v. Gage, 202, 204.
v. Glasgow, 77.
v. Hitzie, 517.
v. Honsel, 367, 375.
v. Hunter, 449, 455, 456
v. Jones, 222, 375.
v. Le Blanc, 453.
v. Marston, 203.
v. Martin, 93.
v. Morgan, 145, 159, 186, 568
v. Muthersbaugh, 601.
v. Piner, 481.
v. Powell, 179, 283.
v. Railroad Co., 203, 366.
v. Reed, 120, 199.
v. Skipwith, 423.
v. Stewart, 271, 320, 322, 331, 393.
v. St. Louis, Iron Mountain, etc. R. R. Co., 164
v. Vanmetre, 481.
v. Walker, 413.
v. Whiting, 39.
v. Williams, 392.
v. Young, 201.
Williamson *v.* Ball, 330.
v. Berry, 326, 330, 336, 338
v. Bower, 530.
v. Bowie, 530, 595.
v. Harris, 203.
Willis *v.* Crooker, 106, 410.
v. Lyman, 83.
v. McNeill, 455, 457.
Wills *v.* Noyes, 457.
v. Sprague, 17.
Wilmerding *v.* Cunningham, 87.
Wilson *v.* Albright, 168, 205.
v. Arnold, 77, 79, 87, 110.
v. Bank of La., 230.
v. Bartholomew, 212.
v. Beadle, 321.
v. Blake, 492.
v. Britton, 57, 58, 431.
v. Burney, 361, 522.
v. Churchman, 27.

Wilson *v.* Forsythe, 586.
v. Kelly, 569.
v. Lane, 188.
v. Lewis, 237, 238.
v. Louis Cook Manf. Co., 416.
v. Manufacturing Co., 449.
v. Murphy, 563.
v. Paulson, 165.
v. Ray, 261, 424.
v. Robertson, 59.
v. Root, 451.
v. Wagar, 358.
v. Wilson's Admr., 402, 404.
v. Wood, 168.
Wiltse *v.* Stearns, 39, 86.
Winchell *v.* Allen, 219, 223, 233.
Winchester *v.* Cox, 450.
Wingate *v.* Wheat, 181.
Winkler *v.* Barthel, 92.
Winslow *v.* Bracken, 376.
Winsor *v.* Orcutt, 451.
Winston *v.* Ewing, 204.
Winstonley *v.* Savage, 46.
Wirker *v.* Scofield, 110.
Withers *v.* Fuller, 514.
Witte *v.* Meyer, 546.
Wittner *v.* Von Minden, 62.
Wolf *v.* Dearborn, 159.
v. McGavock, 39, 43.
v. Styx, 20, 402, 407.
Wolfe *v.* Crawford, 159, 160, 187.
Wolff *v.* Bank of Commerce, 526.
Wolford *v.* Phelps, 536.
Womack *v.* McAhren, 394.
Wood *v.* Barker, 455, 456.
v. Bodine, 567.
v. Buxton, 203.
v. Carleton, 436.
v. Denny, 106, 410.
v. Partridge, 203, 565.
v. Squiers, 120, 127, 421.
v. Thomas, 502.
v. Weir, 171, 455, 456.
v. Wells, 100.
Woodbridge *v.* Morse, 218, 223.
v. Perkins, 213.
Woodbury *v.* Long, 145, 160, 185.
Woodhouse *v.* Commonwealth Ins. Co., 217.
Woodley *v.* Shirley, 137, 251, 423.
Woodman *v.* Trafton, 282, 289.
Woodruff *v.* French, 595.
v. Ives, 67.
v. Taylor, 17.
Woods *v.* Milford Savings Inst., 522, 561.
Woodward *v.* Munson, 285, 286, 402.
v. Woodward, 224.
Woodworth *v.* Lemmerman, 177.
Woolfolk *v.* Ingram, 509.
Woolkins *v.* Haid, 9, 460.
Wooster *v.* McGee, 27.
Worcester Nat. Bank *v.* Cheeney, 21, 172.
Work *v.* Titus, 120, 421.
Worseley *v.* De Mattoe, 500.
Worstell *v.* Ward, 77.
Worthington *v.* Carey, 106.
v. Hylyer, 274.
Wray *v.* Gilmors, 50, 99, 419.
Wright *v.* Bosworth, 197; Boynton, 396.
v. Foord, 201; Andrews, 396.
v. Hale, 141, 545.
v. Herrick, 107, 206, 491.
v. Hobson, 87.
v. Ragland, 110, 420.
v. Smith, 27, 77, 84, 92, 103, 120, 136, 323, 417, 481, 530, 582.
Wrompelmier *v.* Moses, 56.
Wyatt *v.* Barwell, 501.
v. Stuckley, 559.
Wyatt's Admr. *v.* Rambo, 354.
Wynne *v.* Govenor, 398.
Wynn *v.* Wyatt, 396; Wyman *v.* Russell, 522.

Y.

Yale *v.* Cole, 117.
v. Hoopes, 481.
Yarnell *v.* Haddaway, 87.
Yeatman *v.* Savings Inst., 21, 172.
Yelverton *v.* Burton, 266, 485.
Yerby *v.* Lackland, 357.
Yocum *v.* Barnes, 398.
v. White, 561.
Yokum *v.* Thomas, 453.
Young *v.* Campbell, 507.
v. Cooper, 61.
v. Grey, 117, 421.

Young *v.* Nelson, 50, 51.
v. Ross, 227.
v. Walker, 288.
v. Young, 223.

Z.

Zacherie *v.* Bowers, 275.
Zang *v.* Stover, 344.
Zeigenhagen *v.* Doe, 582.
Zeregal *v.* Benoist, 46, 103, 322, 416
Ziegenhagen *v.* Strong, 477.
Zimmer *v.* Davis, 201, 385.
Zollar *v.* Janorin, 407.
Zook *v.* Blough, 413.

Attachment and Garnishment.

CHAPTER I.

THE REMEDY OUTLINED.

§ 1. Definitions and Distinctions.
2. The Suit Personal in Form.
3. The Suit Against Property in Effect.
4. Ancillary Proceeding.
§ 5. The Suit Limited to the Debtor's Property.
6. Absence of Pre-existing Lien.
7. Essentials to Create the Lien.

Sec. 1. Definitions and Distinctions.

In prominent features, nearly all the attachment laws of this country are alike. There is such substantial uniformity that the theory and practice under the statutes may be found susceptible of being treated with unity and system.

Attachment, as generally authorized, is a proceeding to create and enforce a lien. It is a remedy for the collection of ordinary debt by preliminary levy upon property of the debtor to conserve it for eventual execution after the lien shall have been perfected by judgment. The remedy is, in some States, applicable in suits for torts and for liquidated debts not due.

Statutory authorizations of the remedy for other purposes, such as the vindication of pre-existing liens, the recovery of purchase money by the sequestration of specific property, and reparation for not delivering property to the sheriff under an order of court, are exceptional.

The employment of the process to compel the appearance of the debtor, or attachment as distraint, has fallen into disuse; it is almost universally destitute of statutory warrant, and is not in harmony with the remedy now prevailing.

The term, *attachment*, is used variously to designate the writ, the preliminary seizure, and the levy after an ordinary judgment, as well as the remedy in general above explained. It is also employed as expressive of the arrest of a person; for instance, of a witness or a juror for not obeying summons, or of any one for contempt of court. In this work, it is confined to property and is used compendiously to indicate that extraordinary remedial proceeding to which the creditor may resort when ordinary process is inadequate.

Garnishment is attachment in the hands of a third person. Restrictedly, it is the admonition or warning given him, requiring him to hold what is thus attached and submit to the future order of court respecting it. The purpose of the attachment of a debtor's property or credit in third hands, with the warning given, is the same as that of the direct seizure of property found in the possession of the defendant: the creation of an inchoate lien to be perfected by judgment; the conservation of the debtor's property to secure the payment of the debt.

It cannot be said that property is *garnished*; only a person can be warned. The garnishee is garnished; the property or credit attached in his hands is subjected to the process of garnishment, and therefore lawyers sometimes say that it is *garnisheed*. If this latter term is allowable at all, it should be confined to this sense, and perhaps the need of such a word may justify its use; but it is never allowable to say that property is *garnished*.

It will prove advantageous to treat the two forms of attachment together so far as they are governed by common principles, giving chapters specially to garnishment only when it shall be requisite.

Attachment, (whether accompanied by garnishment or not,) is divided into *foreign* and *domestic*. The distinction is drawn in some of the statutes, and strictly maintained in the practice under them. It was formerly more generally insisted upon than it is now; and, though the great majority of the States now treat non-residence merely as one of the grounds of attachment, and authorize proceedings, on such ground, of precisely the same character as those on other grounds—thus simplifying

the general practice—still, in many of those States, the natural differences between the two kinds of attachment are often pointed out in decisions.

Foreign Attachment is a proceeding against the property or credit of a non-resident. It was formerly confined to seizure in third hands when nothing could be found in possession of the debtor, and was always accompanied with garnishment. It was modelled in this country upon the custom of London. The proceedings were as follows: A complaint was filed against the debtor and a writ of summons issued; then, if nothing was found, to be attached as a distress to compel the appearance of the defendant, the writ was returned *nihil;* thereupon, the plaintiff, upon suggesting that some third person is a debtor of the defendant or the possessor of goods belonging to the defendant, caused a writ of garnishment to be issued and served upon such third person, warning him to withhold payment or delivery to the defendant, and to answer as to his indebtedness or possession as alleged. If the garnishee answered affirmatively or did not deny his liability, the defendant was then called and defaulted, and the garnishee was charged. No final decree was rendered against the defendant, but there was a judgment *nisi* against him, and an order upon the garnishee to pay or deliver to the court; and then the plaintiff could have the attached property or credit sold to satisfy his claim upon his giving surety or pledge to restore the proceeds in case the defendant should appear within a year and a day, enter into recognizance, plead to the cause and disprove the debt.

Originally the garnishment had reference only to the indebtedness of a third person to the defendant, as shown by Mr. Locke in his work on Foreign Attachment; but both in England and this country the practice was subsequently extended so as to reach personal property in his hands. The original States derived foreign attachment, as above described, from their mother country; and it is still practiced, almost intact with respect to some features, in a few of them, as will be shown hereafter. Generally, however, throughout the country, it has outgrown its model; and, since the total abolishment of imprisonment for

debt, and the desuetude of distraint to compel appearance, it has been merged into the prevalent remedy, so that non-residence is simply one of the grounds for issuing the process of attachment undistinguished as either foreign or domestic.

Domestic Attachment is a proceeding against the property or credits of a resident debtor. The two forms may be presented without distinction, except in those features where a real difference is discovered. In illustration of such a difference, it is only necessary now to mention that the charge of fraud is not made or implied in the allegation of non-residence, but always is at least implied when the creditor swears that the debtor has absconded, or hidden himself or his effects, or disposed of his property to avoid the payment of his debts, or done anything for which domestic attachment is ordinarily authorized. The charge is merely incidental, but it indicates a real and important difference between the two branches, leading to different provisions relative to procedure, even in some of the States which do not sharply draw the demarcation line between the two. In those where foreign and domestic attachment are recognized and distinguished by statute, proceedings under the one differ materially from those under the other. In the great majority of the States, foreign residence is classified with absconding and other charges as a ground for attachment, and the above mentioned division is not established by statute, and only recognized by the courts when essential to the rightful application of principles.

Ancillary Attachment is a proceeding in aid of the personal action when the debtor has been served or has appeared in court so as to be liable to a personal judgment. It may be either foreign or domestic; it may take the form of the garnishment process; the essential characteristic is that it must be auxiliary to the main action. If the defendant is in court, whether he is a resident or not, his property found in his possession may be attached, or his property or credits found in the hands of a third person may be subjected to garnishment; and, in either case, the attachment is ancillary.

The remedy thus employed is usually an adjunct of the main suit; but when it is used in a separate proceeding to aid the

recovery of the debt for which the principal action is instituted, it is none the less subordinate. The pendency of one of the suits cannot be pleaded as a bar to the other.

Sec. 2. The Suit Personal in Form.

The attachment suit is always personal in form. It is instituted by the creditor against his debtor to recover the debt alleged to be due; also, in some States, for debt not due, and upon any money demand—even for damages *ex delicto;* and there are exceptional authorizations for attachment when the suit is to recover specific property, and when it is for some other designated purposes. In all cases, the debtor is impleaded, and a personal summons is directed to him, commanding his attendance at court. If he be served, or if, without service, he appear, he may except to the proceedings, file pleas, join issue, confess judgment, and do all that any other personal defendant may do in an ordinary case. The evidence adduced by the plaintiff is against the defendant as a personal litigant. Judgment is rendered for or against the defendant in his personal capacity. If rendered against him, execution may be issued against any property of his, liable thereto, as in any other personal action.

The suit is instituted without the previous seizure of any property. It is not ordinarily brought in vindication of any recognized, recorded, pre-existing lien upon any specific property. No particular property is described in the petition, none is impleaded, none is made the fictitious defendant, none is in court at the time the petition and affidavit and bond are filed.

It is true that the purpose of the suit is not only to obtain judgment against the debtor, but to render the execution of it certain by the immediate arrest of property, and the immediate creation of a hypothetical lien upon it, so that it may be conserved for the purpose of final execution; and it is true that the petition contains a prayer for a writ to effect this object, and that the accompanying affidavit and bond are with reference to the contemplated seizure of a sufficient quantity of the debtor's property to secure the debt; but this purpose and these inci-

dents do not affect the *form* of the proceeding as a personal action.

If, notwithstanding such purpose and incidents, nothing is really attached, but the defendant is served or appears, the suit yet holds good against him, as an action simply personal, without any alteration of the pleadings. The creditor may go on and press his claim to judgment, and may execute whatever he may thereafter find. In such case, the suit is personal in both *form* and *effect*.

If the defendant is served, or appears without service, and something is attached pursuant to the prayer of the petition, yet not enough to satisfy the demand; or if sufficient is seized to satisfy the demand in whole or in part, yet the attachment is dissolved *pendente lite*, the plaintiff may still go on to recover a personal judgment against the defendant, upon his pleadings as at first instituted. If the dissolution of the attachment is with reference to only a part of what had been attached, leaving too little to satisfy the judgment; or if too little was attached, under the writ, to meet the demand, the plaintiff, because his judgment is a personal one, may satisfy it out of any property belonging to the defendant, liable to execution, just as though there had been no attachment and no attempt at attachment, as in any other personal suit.

Indeed, whether enough is attached to satisfy the judgment in whole or in part, or nothing whatever is attached, the right of the plaintiff to satisfy his judgment out of any property subject to execution remains precisely the same; showing that, in either event, the judgment is personal,—the result of an action personal in form; and, in this respect, personal in character. It must be remarked, however, that when nothing is attached and the judgment is only personal in character, the proceeding is not an attachment suit, (notwithstanding the prayer, the affidavit, the bond and the writ,) but merely an ordinary action.

The *form* of the suit is personal even when the debtor is not reached by process and only his attached property is brought into court pursuant to the prayer of the petition. The debtor, merely notified by publication, and neglecting to make appearance, is not a party defendant; but the form of the plaintiff's

pleadings remains unaltered, and the suit goes on apparently against the debtor; evidence is offered as against him, and even the judgment is nominally a personal one.

There is no difference whatever, in the form of the attachment suit, whether the proceeding be in effect a personal one or not. The form is always that of a personal action. The true character of the suit must be found by looking below the surface. Other actions are judged by the pleadings: this is somewhat exceptional. It acquires its real character after the plaintiff's initial pleadings have been drawn and filed. Whether or not something shall be attached, subjected to a lien, and finally executed in enforcement of such lien, must determine the quality of the action; and the plaintiff cannot foresee the result when he files his suit. When the result becomes known, he is not required by the statutes to make his original pleading conform to the new state of things. It remains as before. The true character of the attachment suit appears not from the *form* but from the *effect* of the proceeding.

Sec. 3. The Suit Against Property in Effect.

The suit is not, in effect, a personal action, when property is attached yet the debtor is not served with process and makes no appearance.

The court has no jurisdiction over the debtor as a party when he has been merely notified by publication and has not heeded the notice. It has jurisdiction over the property brought into court and over that only. The decree rendered in attachment suits of this sort is formally against the debtor as a personal defendant, but it can be executed against the attached property only; it can be executed only so far as that particular property is capable of satisfying it. The court cannot condemn the debtor personally even for the costs of suit.

It often occurs that the judgment formally rendered, as if against the defendant, is greater in amount than the attached property proves to be worth; and the circumstance that the excess is uncollectable as a personal judgment against the debtor, (however much unattached property he may have within the jurisdiction,) shows conclusively that the judgment bears only

against the property in court, and that so far as it exceeds in amount the value of the property, it is *coram non judice* and absolutely void. That such an action is not really personal, appears from the consideration that, if so, the court would have no jurisdiction. That such an action is really against property, appears from the reflection that only the property is in court, and the jurisdiction is necessarily confined to it.

The suit is so exclusively a property action, when there is no personal defendant, that the record of the case cannot be adduced in evidence against the debtor in any other cause pending against *him*, though it may be against the same property in any competing attachment suit pending against *it*. Indeed, when there is no personal defendant, the very existence of any suit at all depends upon the bringing of property into court. Though the petition has been filed with a prayer for the attachment of any property of the debtor that may be found; though the affidavit and bond have been filed, and the writ duly issued, if the sheriff makes return that no property has been found, the suit at once abates; or, to speak accurately, everything already done is nugatory, and there has really been no suit from the first.

From these considerations it has been definitely decided that if property is attached yet the debtor-owner is not summoned and does not come into court, the only effect of the attachment proceeding is to subject the property to the payment of the creditor's demand, after compliance with statutory requisites.[1]

The judgment is nominally against the defendant named in the petition and affidavit, with privilege on the property,

[1] Cooley's Const. Limitations, 404; Pennoyer *v.* Neff, 95 U. S. 731, 734; St. Clair *v.* Cox, 106 U. S. 350; Cooper *v.* Reynolds, 10 Wall. 308; Harris *v.* Hardeman, 14 How. (U. S.) 334, 340; Fitzpatrick *v.* Flannagan, 106 U. S. 648; Pancoast *v.* Washington, 5 Cr. (C. C.) 507; Westervelt *v.* Lewis & Tooker, 2 McLean, 511, 514; Robinson *v.* Nat. B'k, 81 N. Y. 393; McKinney *v.* Collins, 88 N. Y. 216; Jones *v.* Gresham, 6 Blackf. 291; Kilbourne *v.* Woodworth, 5 Johns. (N. Y.) 37; Matter of Faulkner, 4 Hill, 598; Fitzsimmons *v.* Marks, 66 Barb. 333; Force *v.* Gower, 23 How. Pr. 294; Fisher *v.* Lane, 3 Wils. 297; Coleman's Appeal, 75 Pa. St. 441; Jackson *v.* Bank of the United States, 10 Pa. St. 61; Phelps *v.* Holker, 1 Dall. (Pa.) 261; Fitch *v.* Ross, 4 S. & R. 557; Downer *v.* Shaw, 2 Fos. 277; Miller *v.* Dungan, 36 N. J. L. 21; Field *v.* Dortch, 34 Ark. 399; Myers *v.*

but that it is not really so appears from the fact above stated that it cannot be executed against any other property of his than that which was the subject of the attachment.

These principles are well settled and universally acknowledged, yet some have failed to deduce therefrom the inevitable conclusion that the attachment proceeding is not, in itself, a personal action; that it does not, and, in the nature of things, cannot render the unsummoned and non-appearing debtor a party defendant. The cases which every lawyer encounters in his investigations, in which the act of attaching is mentioned as having in itself the effect of making the defendant a personal party in court in the absence of summons or personal appearance, may be properly noticed hereafter. It has been said that if property is attached and publication made, the defendant is thereby brought into court for all purposes except the rendition of a personal judgment against him. This is self-contradictory; for, if not in court so as to be liable to a personal judgment, he cannot be there for any purpose whatever, unless he has made a special appearance. If, under such circumstances, judgment can be rendered only in effect against the property attached, (which is settled law,) for what conceivable purpose may the unserved and non-appearing debtor be deemed in court by virtue of the publication?[1]

Smith, 29 Ohio St. 125; Egan *v.* Lumsden, 2 Disney, (O.) 168; Wells *v.* Detroit, 2 Doug. (Mich.) 77, 79; Greenvault *v.* F. & M. Bank, Id. 498, 508; Buckley *v.* Lowry, 2 Mich. 418; Matthews *v.* Densmore, 43 Mich. 461; Van Norman *v.* Judge of Jackson Circuit, 45 Id. 204; Bower *v.* Town, 12 Mich. 233; Woolkins *v.* Haid, 49 Mich. 299; Chamberlain *v.* Faris, 1 Mo. 517; Massey *v.* Scott, 49 Mo. 278; Erwin *v.* Heath, 50 Miss. 795. Myers *v.* Farrell, 47 Miss. 281; Bates *v.* Crow, 57 Miss. 676, 678; People *v.* Cameron, 7 Ill. 468; Clymore *v.* Williams, 77 Ill. 618; Hobson *v.* Emporium Real Estate and Manf. Co. 42 Ill. 306; Conwell *v.* Thompson, 50 Id. 330; Rowley *v.* Berrian, 12 Ill. 198, 202; Banta *v.* Wood, 32 Iowa, 469; Doolittle *v.* Shelton, 1 Greene, (Ia.) 272; Wilkie *v.* Jones, 1 Morr. (Iowa,) 97; Mayfield *v.* Bennett, 48 Iowa, 194; Shirley *v.* Byrnes, 34 Tex. 625; Green *v.* Hill, 4 Tex. 465; Hunt *v.* Norris, 3 Martin, (La.) 527. Epstein *v.* Salorgne, 6 Mo. App. 352. (See Mosher *v.* Bartholow, Id. 598.)

[1] An isolated paragraph in King *v.* Vance, 46 Ind. 246, which is completely overborne by the body of the decision, seems to have led to error in this respect. In Cheatham *v.* Trotter, Peck, 198, it is said that if attachment is levied on the property

Perhaps the proceeding by which the debtor's property or credit is attached while in the hands of a third person is not so generally conceded to be an action against property as when the debtor's property is found in his own possession and attached. The only difference between the two, however, is that in the latter case the property comes directly under the control of the court through its executive officer and directly into the possession of that officer; while, in the former, the court's control is through the garnishee and its constructive possession is that of the garnishee. When property is subjected to garnishment it seems plain enough that the court has constructive custody though the garnishee holds, just as it has such custody when a keeper or receiptor is in charge, for the sheriff, of property attached in the debtor's own hands. But when a credit of the defendant's is attached in the garnishee's hands, is the court's constructive possession as clear? Such seizure seems like that of any incorporeal thing, not susceptible of manipulation, attachable only by giving notice to the person in possession. In such case there is no difficulty, in an acknowledged proceeding *in rem*, in treating the true possession and control as being in the court through its officer, after this method of seizure has been employed. Constructive seizure is as good as the actual taking of property, if it is the only kind possible. This is true in admiralty and all other proceedings against things, whether with general or limited notice and effect. Why should it not hold good when a debt due a defendant is attached? Notice is given to the garnishee, and he becomes at once so far the keeper of the incorporeal thing, for the court, that he would be amenable for contempt of court should he not hold the *res* till judgment for or against it. The proceeding is against such incorporeal

of a debtor, he is before the court and judgment may be taken *against him if he does not appear*. See Terrill *v.* Rogers, 3 Hayw. (Tenn.) 203; Mitchell *v.* Sutherland, 74 Me. 100. But it is settled that nothing more than a nominal personal judgment can be rendered under such circumstances, and that the judgment is confined to the property attached. King *v.* Vance, 46 Ind. 246; Miller *v.* Dungan, 36 N. J. L. 21; Clymore *v.* Williams, 77 Ill. 618; Bates *v.* Crow, 57 Miss. 676, 678; Fitzsimmons *v.* Marks, 66 Barb. 333; Kilburn *v.* Woodworth, 5 Johns. 37; Epstein *v.* Salorgne, 6 Mo. App. 352; Banta *v.* Wood, 32 Iowa, 469.

property, and not against the unsummoned and non-appearing defendant.

True, the garnishee is personally served, or, at any rate, must be legally served in some way, before the garnishment can be laid. Does this remove the case from the principles heretofore suggested applicable to attachments in the hands of the debtor himself? And does it make garnishment a personal proceeding?

Personal it doubtless is so far as the garnishee is concerned. He is brought into court; he must personally answer; and when he has denied holding property or owing debt to the defendant, and he is, for this, or any other reason, drawn into litigation, the proceeding is certainly personal and not at all against property. There may be an auxiliary side suit between the attaching plaintiff and the garnishee, wholly personal in character. Usually, any contest between the two occurs in the main case, but is subsidiary to it, and always personal in character.

The case to which such a contest is auxiliary; the case of the attaching creditor against what is subjected to garnishment, is impersonal nevertheless. It is subject to all the considerations heretofore adduced to show that any attachment suit is such.

Suppose the debtor has made an appearance; the garnishee has answered that he owes that debtor a certain sum: what is the situation? There is a personal action against the debtor; there is a property action against the attached credit, which action is ancillary to the personal one. And now, should any contest arise between the plaintiff and the garnishee, such contest would be a proceeding subordinate to both the main and the ancillary action above mentioned. Such a contest might arise even after the garnishee had answered satisfactorily to the plaintiff; for he might subsequently show a disposition to favor the defendant in some way so as to render it necessary for the plaintiff to invoke the court against him; or he might do, or be about to do some other act that would imperil the plaintiff's chance of making the money upon his anticipated judgment, and render it advisable, in his opinion, to take some judicial means of securing his rights.

When the defendant is not in court and not summoned, but is notified by publication, final judgment cannot be rendered against him so as to be enforceable against *any* property of his, in a case of garnishment any more than in a case of ordinary attachment; and this conclusively proves that the proceeding is not a personal action. The same rule with regard to the offering of the record in evidence prevails with respect to judgments in garnishment cases as in other attachment cases.

It is held in Missouri that "garnishment is a proceeding *quasi in rem*, and two services are required: one to bring the garnishee into court and another to bring the property in: without these, the court has no jurisdiction."[1] And in Mississippi, when debt or property is attached in the hands of a third person by process of garnishment, and personal service is made upon the principal defendant, the two proceedings are said to be two actions; the Supreme Court of that State said that there may be a blending of the two actions, and that "one may succeed—the other, fail."[2]

Sec. 4. Ancillary Proceeding.

When the attachment proceeding is ancillary to a personal suit, it is still, in effect, against property.

When both the debtor and his property are in court, the suit is usually deemed a personal one. The presence of the defendant, or his legal citation into court, seems to give the whole proceeding a personal cast; and, in such case, it is common to treat it as a personal action. The courts, without having their attention specially called to the "added incident, that the property attached remains liable, under the control of the court, to answer any demand which may be established against the defendant," not unfrequently speak of such attachment suits as personal actions, though without denying that, so far as the judgment bears directly upon property, such suits may be something more. The Supreme Court of the United States said, when introducing the words above quoted: "If the defendant

[1] Epstein *v.* Salorgne, 6 Mo. App. 352.

[2] Erwin *v.* Heath, 50 Miss. 795.

appears, the cause becomes *mainly* a suit *in personam* * * *."[1] It becomes "mainly" but not wholly such.

It is because of the "added incident" that the attachment suit, under such circumstances, considered as a whole, has been said to be *quasi in rem.* This term has been frequently applied, in a general way, to all suits personal in form, but in effect against property when the defendant is in court; and also when the judgment sought is personal but the proceedings bear upon a thing so as to be seemingly directed against it. There is no objection to such applications of this term, or to its use in designating attachment suits of any kind, when it answers some general purpose in view at the time. There can be no just criticism of its use when it is applied to designate such a suit as a whole, without atttempting any differentiation when "the cause is *mainly* a suit *in personam.*" [2]

Perfect accuracy, however, is important in distinguishing between the major and the minor proceedings in such a suit; it is, indeed, necessary to the complete presentation of the subject of attachment. When both the debtor and his property are in court, the proceeding against the property is ancillary to the personal action.[3] The suit may be prosecuted to judgment against the debtor, independently of the ancillary proceeding.[4] The attachment may be dissolved and yet the personal judgment hold good.[5] On the other hand, though the attachment proceeding would abate if the personal suit were dismissed, (owing to its auxiliary and dependent character,) it retains, while it exists, all the characteristics which make it a proceeding *in rem.* The sole purpose of all attachments of property is the creation and enforcement of a lien, whether the debtor is in court or not. The affidavit, the bond, and the writ have the same relation to the property attached when the debtor is present as when he is absent. So far as the validity of the proceeding against

[1] Cooper *v.* Reynolds, 10 Wall. 308.

[2] McComb *v.* Allen, 82 N. Y. 114; Parsons *v.* Paine, 26 Ark. 124; Maxwell *v.* Stewart, 22 Wall. 77.

[3] Bivens *v.* Mathews, 7 Bax. 256.

[4] Fitzpatrick *v.* Flannegan, 106 U. S. 650.

[5] Bundrem *v.* Denn, 25 Kan. 430; Bates *v.* Crow, 57 Miss. 676; Parker *v.* Brady, 56 Ga. 372; Erwin *v.* Heath, 50 Miss. 795; Bayersdorfer *v.* Hart, 12 Phila. 192.

attached property is concerned, it makes no difference whether the debtor is personally summoned or constructively notified; whether he responds to service or notice or does not. It does make all the difference between attachments when the question is whether any given proceeding against property is principal or ancillary, but none as to its character, whether *in rem* or not. The proceeding is not the less against a thing because it is ancillary. It must be concluded that an attachment suit, whether it is ancillary or not; whether the debtor responds or not, is in effect always *in rem*, though in form always *in personam*.

It is essential, whether the attachment be principal or ancillary, that there be seizure and detention of property, jurisdiction of the court over it as a thing and judgment perfecting the hypothetical lien or asserted *jus ad rem:* requisites not at all appertaining to a personal suit.

Sec. 5. The Suit Limited to the Debtor's Property.

It is not a proceeding *in rem* with general notice and effect, but with limited notice and effect.

Notice being limited to the debtor, and the attached property being proceeded against only as his, and the judgment being against it only as such, the debtor and his privies are the only persons concluded by the decree. All who are parties to the action are bound, but only the rights of property of the debtor and his privies, in the attached property which is condemned to pay, and is sold under execution, are affected by the proceeding and decree.

Because proceedings with general notice, to vindicate a *jus in re*, are conclusive upon all the world, while attachment suits are not, some have denied that the latter are *in rem*. The right inference is that they are not of that class of property actions which are, in their judgments, universally obligatory. They are unlike actions to declare the *status* of offending things and to pronounce their forfeiture; and those to adjudge upon the *status* of enemy property, (captured as naval prize or seized upon land,) to pronounce its confiscation; and those to pronounce the forfeiture of an indebted thing

given in pledge and not redeemed. They cannot be classified with any of those proceedings, all of which are in vindication of rights *to* things and not merely rights *in* things.

The decisions which deny that attachment suits are against things show, in their reasoning, that the courts have merely meant that such suits do not belong to the class mentioned.

There is another class to which they do belong: proceedings with limited notice and effect. Actions against property which are not irrespective of its owner; which are not attended by notice to all the world so as to render all persons liable to be concluded by the judgment; which are not based upon a seizure prior to the suit; in which the *res* is not impleaded; but which are yet, in effect, proceedings against property, constitute a separate class to which attachment suits rightfully belong.

When property is proceeded against as an indebted thing, the proceeding is always in vindication of a lien except when against a forfeited pledge. Attachment suits are such; for the plaintiff proceeds from the first as if he had a lien, and his assumption is sustained if he prosecutes his case to judgment.

But actions against things, brought upon liens, are not all of the class designated above as proceedings *in rem* with limited notice and effect. All are against indebted property, and all seek to have the property condemned to pay debt—not to have the property itself forfeited; but in some of them, (those in vindication of admiralty liens, for instance,) the judgments are of universal obligation; while in others, (including attachment suits,) the judgments are obligatory only upon the debtor and his privies. The former are conducted irrespective of the owners of the things seized; the latter only with reference to the interest of the debtor; in the former the notice or monition is general: in the latter it is limited to the debtor; in the former, all persons interested must appear and assert their rights or they will be forever concluded by the decree against the property: in the latter, they need not appear, (except the notified debtor,) and they cannot be defaulted, nor affected by a final decree subjecting the property to pay.

Both classes are against things—against things indebted; but the difference of result in the two, warrant and require their

distinction as *Proceedings with general notice and effect*, and *Proceedings with limited notice and effect.*

If the universality of the judgment-obligation were the criterion by which to judge whether a suit is against a thing or not, all actions belonging to the second class mentioned, including attachment suits, would be ruled out. It is certain that a judgment in an attachment case is not conclusive against all the world. It is certain that it is limited in its conclusiveness to the debtor-owner and his privies.

Is the universality of effect the true criterion by which to determine whether a proceeding is against a thing? It has often been made the criterion, because courts have had in mind proceedings with general notice, and have thought that all suits must conform to them in the feature of universal conclusiveness to be entitled to the designation of proceedings against things. And, where this feature has appeared, they have accepted the proceeding as one against a thing even when it has been to declare personal *status*. In illustration, may be mentioned the judicial recognition or appointment of an administrator, executor or guardian.[1]

Orders making such appointments have some reference to property, it is true; but they do not differ from like orders in which no property is concerned, such as those fixing the *status* of a pauper,[2] emancipating a minor, naturalizing a foreigner,[3] etc., which, by the same criterion, have been also held to be *in rem*, though no property whatever is necessarily involved.

There is a class of orders which, by this criterion, have been put with proceedings against things, though the orders have but a slight relation to property, and cannot properly be said to be against it; such as those discharging a bankrupt,[4] settling the accounts of an administrator or executor,[5] granting letters of

[1] Farrar *v.* Olmstead, 24 Vt. 123.

[2] Regina *v.* Hartington, 4 Ellis & Bl. 780; Regina *v.* Wye, Adolph & E. 761.

[3] McCarthy *v.* Marsh, 1 Seldon, 263; The State *v.* Penny, 5 Eng. 621.

[4] Livermore *v.* Swasey, 7 Mass. 213; *In re* Bellows, 3 Story, 128; Very *v.* McHenry, 29 Me. 206.

[5] Tibbetts *v.* Tilton, 4 Foster, 120; Bryant *v.* Allen, 6 N. H. 116; Clark *v.* Callaghan, 2 Watts, 259.

administration,[1] probating wills,[2] etc. Of these, and many other orders and proceedings, the most that can be said is that they resemble proceedings *in rem* with general notice in the feature of universal conclusiveness; and this is all that the courts have meant to say.[3]

While, on the one hand, orders fixing the *status* of persons have thus been treated as proceedings against things by reason of their universal obligation, attachment suits have been denied that character because binding only upon parties and privies.[4] The universality of the obligation is not the right criterion, as to what is a proceeding *in rem*. The test question is, Are the proceedings against a thing? They may be so, yet the judgment-result may bear only on the thing as the property of a specified owner and be conclusive upon only him and his privies. They may be so, and the judgment-result may bear upon the thing irrespective of its owner or owners, and be conclusive upon all the world. In the latter case, there is a proceeding *in rem* with general notice and effect. In the other, there is a proceeding *in rem* with limited notice and effect.

Certain probate proceedings are against the property of the decedent, which is an indebted thing; and they belong to the same class with attachments, since condemnation and sale follow limited notice, and the whole world is not concluded by the

[1] Lawrence *v.* Englesby, 24 Vt. 42; Stein *v.* Bennett, 24 Vt. 303; Ryland *v.* Green, 14 S. & M. 194.

[2] Woodruff *v.* Taylor, 20 Vt. 65.

[3] Ennis *v.* Smith, 14 How. 400; Dublin *v.* Chadburn, 16 Mass. 433; Laughton *v.* Atkins, 1 Pick. 535; Osgood *v.* Breed, 12 Mass. 525; Peters *v.* The Warren Ins. Co., 3 Sum. 389; Dickinson *v.* Hayes, 31 Ct. 417; Shermer's Appeal, 8 Wright, 396; Vanderford *v.* Van Valkenberg, 2 Seld. 190; Holliday *v.* Ward, 7 Harris, 485; Lovett *v.* Matthews, 12 Id. 338; Shinn *v.* Holmes, 1 Casey, 142; Hodges *v.* Baneham, 8 Yerg. 186; Box *v.* Lawrence, 14 Tex. 345; Herbert *v.* Hanrick, 16 Ala. 581; Wills *v.* Sprague, 3 Gratt. 355; Judson *v.* Lake, 3 Day, 3.8.

[4] Magee *v.* Beirne, 39 Pa. St. 62: "The judgment concludes parties and privies, but not strangers. It is not true of a judgment in attachment that it authorizes the plaintiff to seize a third party's property for the defendant's debt. In 2 Smith's L. C., Am. Ed. p. 689, *et seq.*, the cases on this head will be found collected, and their result stated to be that, properly speaking, proceedings by attachment are not *in rem*, but are rather proceedings against the interest of the defendant and those claiming under him in the thing attached." And there are other cases, upon this and

result.[1] Neither such probate, nor ordinary attachment proceeding is formally against property. The principal suit is a personal one, when the defendant is served with process in an attachment suit, though there is an accompanying ancillary proceeding against property. Nearly all probate procedures are *in personam*, and property is seized and sold in execution of judgments rendered therein.

Notwithstanding the position of those who make universality of judgment-obligation the criterion; and who, by that test, seek to range all classes of property actions under one head, it is apparent that there are different kinds of proceedings against things as there are different kinds against persons.

It is definitely decided that attachment suits are *in rem*, by the highest tribunal in the land, followed by the State courts, as herein before shown; but the right classification of them, and the distinction of them from suits of the same general character which are binding upon all the world, seemed absolutely necessary at the very outset of a work on the subject of Attachment. Error may be avoided by restricting this important remedy to its true sphere; and questions of seizure, notice,

like reasons, in which the same result is reached. Eaton *v.* Pennywit, 25 Ark. 144; Walker *v.* Cottrell, 6 Bax. 257; Ingle *v.* McCurry, 1 Heis. 26; Houston *v.* McCluney, 8 W. Va. 135.

[1] Because probate decrees against things are not *res adjudicata quoad omnes*, the proceedings have been excluded from classification with proceedings *in rem*, being tested by the wrong criterion above mentioned. In Smith's L. C., II., p. 691, it is said: "The proceedings which are very generally in use in the Probate and Orphans' Courts of this country, for the sale of the real estate of an ancestor for the payment of his debts, or for the purpose of facilitating or affecting a partition or distribution among his heirs, are commonly instituted by petition or publication, without any direct or personal service of process, and are sometimes described as proceedings *in rem*; and there can be no doubt that the order or decree in such cases will be conclusive as regards every one who claims title by descent from the ancestor, whether he is or is not actually before the court: Benson *v.* Cilly, 8 Ohio, N. S. 604. But the substantial difference between such an order and a true judgment *in rem* is, that the estoppel is limited to the parties and privies, and will not be binding even on them, unless they had actual or constructive notice in the manner prescribed by statute." It is only necessary to reply that no proceeding whatever against a thing is binding without notice when that is a statutory requisition.

jurisdiction, rank of competing liens, and others, will be thus greatly simplified.

The attachment suit, though always personal in form, is, or includes, a suit in rem with limited notice and result.

The importance of this proposition will be seen as the whole subject of attachment is studied. It is absolutely necessary to the clear treatment of attachment and garnishment that the character of the proceedings, whether personal or not, should be set forth at the outset. The statute authorizations are all directed to property, since personal suits for debt could be brought without such special statute authorization. Separating the suit for debt, brought against the debtor, from the suit to create a lien brought against the debtor's property, the latter is seen to be not personal in effect.

The tendency is towards the universal recognition of the dual character of actions in which attachments are sued out.

The Supreme Court of Mississippi says that every attachmene suit is "virtually two suits: one *in rem* and another *in personam*. * * * The two proceedings now progress in a great degree independently of each other," that is, since the adoption of the statute of 1878, (Stat. p. 193;) and now the filing of a plea to the merits in the personal suit is not a waiver of a plea in abatement of the attachment suit.[1] And it adds that under the former statute the rule was different as to such pleas.[2] The doctrine has long been recognized in that State, (as indeed everywhere,) that the personal suit may be prosecuted to judgment, though the attachment suit be dismissed.[3]

In that State, a verdict sustaining an attachment is separate from one on the merits of the personal suit, and the respective judgments following may be separately considered on error. A judgment on a plea in abatement is not final and reviewable

[1] Bates *v.* Crow, 57 Miss. 676, 678.

[2] Lewenthall *v.* Miss. Mills, 55 Miss. 101.

[3] Miller *v.* Ewing, 8 S. & M. 421; Harris *v.* Gwin, 10 Id. 563; Jones *v.* Hunter, 4 How. (Miss.) 342; Henderson *v.* Hamer, 5 Id. 535; Lester *v.* Watkins, 41 Miss. 647; Bishop *v.* Fennerty, 46 Id. 570; Holman *v.* Fisher, 49 Id. 472; Erwin *v.* Heath, 50 Id. 795.

before that upon the merits of the principal cause, but a writ of error upon the latter takes up both.[1]

The law and practice are general that the personal suit may be prosecuted to judgment though the attachment be dissolved.[2] The bench and the bar are unanimous on the doctrine that judgment binds the attached property only, (and binds it as property of the defendant only,) when the defendant, though notified by publication, has not been brought into court; and thus, though all would not agree upon terms, all admit that the attachment proceeding is against property. It is not important that all should concede that the proceeding is *in rem* so long as the idea underlying the term is entertained; but it is of great importance that those who apply the term should distinguish between a suit against a thing as the property of a designated owner with notice to him alone, and a suit against a thing irrespective of personal ownership. In an attachment suit, the interest of the defendant is the *res*.

If the profession insist that an order fixing the *status* of a person is *in rem*, error need not necessarily ensue, provided they do not hold universal conclusiveness to be the criterion; but they can hardly confound things guilty and things hostile with things indebted, and the absolute right or *jus in re* with the relative right or lien, and proceedings under general notice with those under limited, without consequent error.

Sec. 6. Absence of a Pre-existing Lien.

The *jus ad rem*, or right in the property to the amount

[1] Fitzpatrick *v.* Flannagan, 106 U. S. 648, 660, in which the personal judgment was affirmed, but that against the property reversed, and the case remanded.

[2] Hills *v.* Moore, 40 Mich. 210; Epstein *v.* Salorgue, 6 Mo. App. 352; Wolf *v.* Styx, 99 U. S. 1; Brenner Trucks & Co. *v.* Moyer, 98 Pa. St. 274; Buckingham *v.* Swezy, 61 How. Pr. 266; McCombs *v.* Allen, 82 N. Y. 114; Scanlon *v.* O'Brien, 21 Minn. 434; Dierolf *v.* Winterfield, 24 Wis. 143; Myers *v.* Smith, 29 Ohio St. 120; Eddy *v.* Moore, 23 Kan. 113; Hill *v.* Harding, 93 Ill. 77; Phillips *v.* Hines, 33 Miss. 163; Irvin *v.* Howard, 37 Ga. 18; Shirley *v.* Byrnes, 34 Tex. 625; Love *v.* Voorhies, 13 La. Ann. 549; Gillispie *v.* Clark, 1 Tenn. 2. And the duality of the attachment suit is recognized: Bundrem *v.* Denn, 25 Kan. 430; Grubbs *v.* Colter, 7 Bax. 432; Bivens *v.* Matthews, 7 Id. 256; Walker *v.* Cottrell, 6 Bax. 257, and many others.

of the debt, or lien resting upon property susceptible of being satisfied out of it, is absolutely essential to an action against the property as a thing indebted. Such right ordinarily must exist before the action can be instituted, because the very object of the suit is to vindicate the right. The attachment suit is anomalous: for its office is both to create and enforce a lien. The creditor, however, proceeds on the assumption that the *jus ad rem* already exists; he makes *ex parte* proof of a state of facts which entitles him to a lien under the law if his sworn allegations be true. Though entitled to it under such circumstances, the right is not specific until some property or credit of the debtor has been attached: then the creditor has a *jus ad rem.*[1]

This incipient, specific lien or right is hypothetical: it depends upon being perfected by a judgment retroactive to the time of its inception.[2] If thus matured, it must be deemed a complete incumbrance upon the attached property from the date of the levy, to be marshalled as superior in rank to all subsequent liens, mortgages, assignments and sales. If not thus matured, it must be treated as nothing; the debt sued upon, though enforceable by judgment, has no relation to the property illegally attached; and the creditor is responsible in

[1] Smith *v.* Bradstreet, 16 Pick. 264; Van Loan *v.* Kline, 10 Johns. 129; Bates *v.* Plousky, 28 Hun. 112; Scarborough *v.* Malone, 67 Ala. 570; Hurt *v.* Redd, 64 Id. 85; Carey *v.* Gregg, 3 Stew. 433; Hervey *v.* Champion, 11 Humph. 569; Moore *v.* Fedawa, 13 Neb. 379; Berryman *v.* Stern, 14 Nev. 415; Moresi *v.* Swift, 15 Nev. 215; Yeatman *v.* Savings Institution, 95 U. S. 764; Peck *v.* Webber, 7 How. (Miss.) 658; Saunders *v.* Columbus Life Ins. Co. 43 Miss. 583; McBride *v.* Harn, 48 Iowa, 151; People *v.* Cameron, 7 Ill. 468; Worcester National Bank *v.* Cheeney, 87 Ill. 602; Liebman *v.* Ashbacker, 36 Ohio St. 94; Patch *v.* Wessels, 46 Mich. 249; Greely *v.* Reading, 74 Mo. 309; Chandler *v.* Dyer, 37 Vt. 345; Metts *v.* Ins. Co. 17 S. C. 120; Goore *v.* McDaniel, 1 McCord, (S. C.) 480; Carter *v.* Champion, 8 Ct. 549; Davenport *v.* Lacon, 17 Id. 278; Adler *v.* Roth, 2 McCrary, 445; Schacklett's Appeal, 14 Pa. St. 326; Hoag *v.* Howard, 55 Cal. 564; Chandler *v.* Dyer, 37 Vt. 345; Vincent *v.* Huddleston, Cooke, (Tenn.) 254; Ward *v.* McKenzie, 33 Tex. 297; Harrison *v.* Trader, 29 Ark. 85; Trellson *v.* Green, 19 Id. 376; Desha *v.* Baker, 3 Id. 509; Moore *v.* Holt, 10 Gratt. 284; Erskine *v.* Staley, 12 Leigh, 406.

[2] Tennant *v.* Battey, 18 Kan. 324; Fuller *v.* Hasbrouck, 46 Mich. 78; Avery *v.* Stephens, 48 Mich. 246.

damages for his false assumption of the *jus ad rem*, his abuse of the extraordinary process employed and his perversion of the law.[1]

This lien is not conventional but is created by law; rather, it arises by operation of law upon circumstances existing with regard to the debtor in his relation to his creditor, and upon the authorized preliminary seizure of property to conserve it for the eventual satisfaction of the debt. The legislator cannot arbitrarily give one man a lien upon the property of another any more than he can thus transfer the property itself from the owner to the favored donee; but, by general laws, a lien, not the result of the consent of parties, may constitutionally spring into existence upon the happening of certain conditions, and possess all the qualities of a conventional incumbrance upon specific property.

Conventional liens are not enforceable by attachment, as a general rule. The suit is to create and enforce the law-made lien. The exceptions constitute probably less than one *per centum* of attachment cases. If the creditor has a pre-existing right in a thing arising from contract, he need not invoke the extraordinary process of attachment to secure it. Should he resort to this remedy to recover his debts, he need not aver the existence of his prior privilege; and, indeed, he may as well abandon it. In some States, a creditor whose debt is already secured by mortgage or other already existing lien, is expressly inhibited from proceeding under the attachment statute against the hypothecated property. In all, the vindication of conven-

[1] Hardeman *v.* Morgan, 48 Tex. 103; Lowenstein *v.* Monroe, 55 Iowa, 82; Turner *v.* Lytle, 59 Md. 199; Raymond *v.* Green, 12 Neb. 215; Boyer *v.* Clark, 3 Neb. 161; Stevens *v.* Able, 15 Kan. 584; Read *v.* Jeffries, 16 Kan. 534; Wagner *v.* Stocking, 22 Ohio St. 297; Dent *v.* Smith *et al.* 53 Iowa, 262; Campbell *v.* Chamberlain, 10 Iowa, 337; Carey *v.* Gunnison, 51 Id. 202; Vorse *v.* Phillips, 37 Id. 428; Bunt *v.* Rheum, 52 Id. 619; Carver *v.* Shelley, 17 Kan. 472; Nolle *v.* Thompson, 3 Met. (Ky.) 121; Smith *v.* Story, 4 Humph. 169; Spaulding *v.* Wallett, 10 La. Ann. 105; Moore *v.* Willenberg, 13 Id. 22; Accessory Co. *v.* McCurran, Id. 214; McDaniel *v.* Gardner, 34 Id. 341; Dickinson *v.* Maynard, 20 Id. 66; Harger *v.* Spofford, 46 Iowa, 11; Kinsey *v.* Wallace, 36 Cal. 462; Cochrane *v.* Quackenbush, 29 Minn. 376; Clark *v.* Brott, 71 Mo. 473; Frank *v.* Chaffe, 34 La. Ann. 1203.

tional liens by attachment is without statutory warrant. There are, however, in several states, authorizations of the remedy to enforce pre-existing liens, not conventional; and hence arise the exceptional attachments above mentioned. The sequestration of property in a suit to recover its price is often called attachment, though the proceeding should be classed with suits to vindicate the vendor's lien. Considered as an attachment case, it is exceptional, since the writ is directed to specific property and the seizure bears a relation to competing attachments under the prevalent system quite different from that of a preliminary levy to secure an ordinary debt. Suits on log liens, known in several states, have also this exceptional character, so far as concerns the direction of the writ to particular things, and the arising of the lien from another source than seizure. The same may be said of attachments of ship materials, of manufactured slate, of cut granite, of growing crops, etc., under special statutes.[1] Other anomalous applications of the remedy, and other uses of the term *attachment* than that in which it is ordinarily employed with reference to property, will be noticed hereafter. The general rule is that attachment is to enforce liens of its own creation; not those pre-existing whether conventional or of other character.

Ordinary debt is what the remedy aids in suits for its collection. Ordinary property is what the lien-creating law hypothetically encumbers under the given circumstances. This is anomalous, extraordinary and contrary to the usages of the common law. The attachment system is thus abnormal, unique, and governed by principles in many respects peculiar. It is nevertheless symmetrical, consistent and consonant with the requisites of legal science. It is based on the recognition of property liability for the pecuniary obligations of its debtor-owner. It rests on the assumption of the primary responsibility of that to which credit has been virtually given—a responsibility equivalent to a general, silent lien. It recognizes such property liability as latent, yet susceptible of being made

[1] Brugman *v.* McGuire, 32 Ark. 733; Fuller *v.* Nickerson, 69 Me. 228; Murphy *v.* Adams, 71 Id. 113; Flood *v.* Randall, 72 Id. 439; Haywood *v.* Cunningham, Id. 128; Tignor *v.* Bradley, 32 Ark. 733.

the foundation of the inchoate, specific, attachment lien, when the creditor shows by his affidavit that the debt is due and of such character as the statute prescribes and that such statutory grounds exist as to render inadequate the ordinary process for the collection of debt.

Sec. 7. Essentials to Create the Lien.

The remedy is entirely statutory. Every state has its own statute, and therefore the general system varies in each. All agree, however, in essentials; the differences appear in minor matters. Everywhere, the remedy is wholly dependent upon statute authorization, so that no attachment suit could be instituted in any state were the laws there authorizing it repealed.

To the statute, then, the creditor must look for his right to resort to this extraordinary mode of relief. He must observe all the conditions imposed. He must lay his grounds within the purview of the legislative grant. His money demand, though but an ordinary debt, must be due upon contract, if the statute of his State limits him to that. The defendant must be a non-resident or an absconding or property-concealing or fraudulent debtor, or whatever else may render him liable as an attachment-defendant under the law. All statutory requisites must be observed under pain of nullity. They are essential to the jurisdiction of the court. The statutory requirements of the affidavit, the bond, the writ, the summons, and of the notice on failure of summons, especially when that is made jurisdictional by the statute, as it always should be, are indispensable as the seizure itself. Indeed, seizure would be invalid and would be no attachment, legally speaking, in the absence of the pre-requisites; and it would not justify a judgment perfecting the lien in the absence of subsequent requisites.[1] Even a court of general jurisdiction acts upon special authority so far as attachment is concerned, and must look to the statute for power to hear and determine the cause; and the authorization cannot be extended beyond the true import of the law.[2]

[1] See many authorities cited in Ch. X, § 5.

[2] See Ch. X, § 6.

The requirement of an attachment bond is not universal like that of the affidavit; but, wherever required, it is jurisdictional. The intent of the law-maker is that process shall not issue upon the *ex parte* statement of the creditor under his own oath unless he first secure the alleged debtor from injury in case it shall prove to have been sued out wrongly and even maliciously.[1] Without a bond, the plaintiff is bound to repair any damage done by his abuse of process, but the cases are numerous in which he is not pecuniarily able to make good any loss which he may thus inflict: so the statutory requirement of a bond with surety would be everywhere a commendable and salutary provision, and ought to be universal in consideration of the abnormal character of the attachment remedy. The requirement is now very general; and, wherever it exists, it proves of practical value, greatly conducive to restraint upon the abuse of the process and to the protection of innocent and non-indebted defendants.

The writ must be valid to render the attachment so. It is essential to its validity that the personal action be first instituted, at least that the petition be filed or such initiatory step taken as required by the practice of the State for the commencement of an action for debt or such money demand as the statute recognizes as a proper cause of action; because, the conservative remedy being merely to aid a principal suit, such suit must first be in a condition to be aided. It is also essential to the validity of the writ that it be preceded by just such an affidavit as the statute requires, since otherwise the special power of the judge to issue it, directly or through his ministerial officer, would not be called into being. So must the bond precede, where that is jurisdictional. The command to the sheriff to do that which is trespass if not done under the order of a court having the right to order by first acquiring jurisdiction so far as the issuing of

[1] Benedict *v.* Bray, 2 Cal. 251; Thompson *v.* Arthur Dudley, (Ga.) 253; Cousins *v.* Brashier, 1 Blackf. 85; Ford *v.* Woodward, 10 Miss. 260; Briggs *v.* Smith, 13 Tex. 269; Boatwright *v.* Stewart, 37 Ark. 614; Dent *v.* Smith, 53 Iowa, 262; Clark *v.* Brott, 71 Mo. 473; Lawrence *v.* Hagerman, 56 Ill. 68, and other cases cited in Ch. XIV, § § 2, 3.

the writ is concerned, is no protection to him or to the plaintiff unless statutory pre-requisites have been first observed.[1]

The summons, under the prevailing practice, may go out with the petition and the writ of attachment, and its issue is indispensable to the efficacy of both. Effort to serve the defendant is everywhere required. But it is not an indispensable requisite that the summons be served, for the theory of attachment is that the extraordinary remedy should be employed when the defendant cannot be reached by ordinary process or when the circumstances are such that such process is not likely to prove adequate. On failure of the necessary effort to summon him, he may be notified by publication.

The writ may be legally executed though the summons has not been served. The execution of it is an indispensable requisite to jurisdiction in the sense of power to hear and determine. It is not in an any higher sense jurisdictional than the affidavit, the issue of the summons, and the bond where required; the court does not gain jurisdiction by its own process, as has been sometimes supposed. The return that the writ has been executed but the summons not served enables the court, at that stage, to do nothing more than take custody of the property and order notice, by publication or by some legally authorized method, to the defendant. When the period of the notice has expired, and official proof of it has been made, the non-appearing defendant is liable to default.

No default can be entered in any personal suit unless the defendant has been guilty of *laches;* unless he has disregarded either summons or other notice; and, since the attachment is auxiliary, it can afford no greater facilities for defaulting. The very fact that attachment statutes require notice after seizure when summons has failed, shows that they do not recognize seizure itself to be notice.

In brief, attachment, considered as a means of creating a lien in favor of an ordinary debtor; as a preliminary levy anticipatory of execution after judgment; as an innovation on common law, and as the means by which extraordinary jurisdiction

[1] See Ch. IV, § 4, and cases there cited.

is acquired and exercised, is a harsh and exceptional remedy; and because it is such, the statutes authorizing it should be strictly construed.[1]

The doctrine of strict construction, with regard to attachments, is confined to the authorization of the remedy. There being no law for such procedure except that of the statute under which it is prosecuted, and the statutory authorization being out of the ordinary, as aboved expressed, the doctrine of striet construction applies when the authority to proceed is in question. But when there is clearly a grant of authority, the questions which arise in practice thereunder, such as those concerning evidence and the like, are not to be governed by the rule. Even the statutes themselves will be liberally construed in the interests of justice and against fraud, when the authorization of the remedy is clear.[2]

There is a marked difference between the evidence required

[1] May *v.* Baker, 15 Ill. 89; Moore *v.* Hamilton, 7 Ill. 429; Poole *v.* Webster, 3 Met. (Ky.) 278; Haywood *v.* Collins, 60 Ill. 328; Wilkie *v.* Jones, 1 Morr. (Ia.) 97; Musgrave *v.* Brady, Id. 456; Leake *v.* Moorman, Phill. (N. C.) L. 168; Devries *v.* Summitt, 86 N. C. 126; Humphrey *v.* Wood, Wright, (Ohio,) 566; Myers *v.* Smith, 29 Ohio St. 125; Wooster *v.* McGee, 1 Tex. 17; Marx *v.* Abraham, 53 Tex. 264; Caldwell *v.* Haley, 3 Tex. 317; Becker *v.* Bailies, 44 Ct. 167; Colt *v.* Ives, 31 Ct. 25; Montpelier &c. R. R. Co. *v.* Coffrin, 52 Vt. 17; Barksdale *v.* Hendree, 2 Patt. & H. (Va.) 43; Hopkirk *v.* Bridges, 4 H. & M. 413; McPherson *v.* Snowden, 19 Md. 197; Smith *v.* Easton, 54 Md. 138; Grace *v.* Rittenberry, 14 Ga. 232; Waxelbaum *v.* Paschal, 64 Ga. 275; Metts *v.* Ins. Co. 17 S. C. 120; Claussen *v.* Fultz, 13 S. C. 476; Buckley *v.* Lowry, 2 Mich. 418; Van Norman *v.* Jackson Circuit Judge, 45 Mich. 204; Graham *v.* Burckhalter, 2 La. Ann. 415; Planter's Bank *v.* Byrne, 3 Id. 687; Wilson *v.* Churchman, 4 Id. 452; Shirley *v.* Owners, 5 Id. 260; Stockton *v.* Douney, 6 Id. 581; Boardman *v.* Glenn, 7 Id. 581; New Orleans *v.* Garland, 11 Id. 438; Gordon *v.* Baillie, 13 Id. 473; Price *v.* Merritt, Id. 526; Frellson *v.* Stewart, 14 Id. 832; McDaniel *v.* Gardner, 34 La. Ann. 342; Wright *v.* Smith, 66 Ala. 545; Johnson *v.* Hannah, Id. 127; Pierce *v.* Smith, 1 Minn. 82; Anerbach *v.* Hitchcock, 28 Minn. 73; Hines *v.* Chambers, 29 Minn. 7; Bundrem *v.* Denn, 25 Kan. 430; Clark *v.* Brott, 71 Mo. 473; Anderson *v.* Coburn, 27 Wis. 558; State *v.* Cornelius, 5 Oregon, 46; Wescott *v.* Archer, 12 Neb. 345; Creighton *v.* Kerr, 1 Col. 519; Moresi *v.* Swift, 15 Nev. 215; Spiegelberg *v.* Sullivan, 1 New Mex. 575; Bottom *v.* Clarke, 7 Cush. 487; Gregg *v.* Nilson, 8 Phila. 91; Sheedy *v.* Second National Bank, 62 Mo. 17.

[2] Bank of Augusta *v.* Conrey, 28 Miss. 667; Bryan *v.* Lashley, 21 Id. 284; Flake *v.* Day, 22 Ala. 132; Bur-

for the issue of the writ, and that for the maintenance of the attachment. Statutes which authorize the issue upon the creditor's oath to his belief of the existence of the necessary grounds do not warrant the sustaining of the attachment upon merely such belief. The plaintiff is bound to proceed contradictorily with the defendant and to establish the fact of the existence of some statutory ground and cause of action by competent testimony.[1] Or, if the defendant is not in court to be proceeded with contradictorily, the plaintiff must prove the existence of the fact or facts which he had previously believed to be true, before he can have default confirmed and final judgment rendered with privilege upon the property attached. In making further proof, upon traverse of the affidavit, where the question is whether it is in conformity to statute when the affiant has sworn to his belief, the fact of his belief is the question at issue; when he has sworn to his good reason for belief, the reasonableness of his opinion may be the point of controversy; but when he comes affirmatively to sustain his attachment, the burden of proof is on him, not merely to show that he had such belief or reasonable ground to believe, (where such sworn allegations are admissible,) as warranted the rightful issue of the writ, but that the necessary facts constituting ground for attachment and cause of action are true. He must then establish, not that he believed, but that the fact was that the debtor had absconded, was about to abscond, was fraudulently concealing property, or whatever statutory ground he may have declared upon.

At this stage, the court is in the *exercise* of jurisdiction previously acquired through strict compliance with statutory requisites: so now an error committed with reference to the evidence given to sustain the attachment or any other illegal use of power vested, though specially given by statute, would not be void but only voidable; would not render the judgment *coram non judice;* would not subject it to subsequent collateral attack, but would be reviewable only in an appellate court.

nell *v.* Robertson, 10 Ill. 282; Hannibal & St. Joe R. R. Co. *v.* Crane, 102 Ill. 249; Peoria Ins. Co. *v.* Warner, 28 Ill. 429; Girard Life Ins. Co. *v.* Field, 45 Pa. St. 132.

[1] Sublett *v.* Wood, 76 Va. 318.

It is exceedingly important however that the professional reader bear in mind that compliance with all the statutory requisites but one does not give the court jurisdiction so as to render the non-observance of that one a mere matter of error rather than a jurisdictional defect. The seizure confers no right to determine the cause judicially if it has not been effected under a valid writ; the writ cannot possibly be valid, however regular upon its face, if it has not been issued under a valid affidavit; the affidavit cannot be valid unless the statute, whence it derives its entire right of being, has been virtually followed. So, the bond must have been given where required; the petition must have been filed and the summons issued. No jurisdiction arises upon mere seizure which renders the neglect of any other statutory requisite a mere error in the exercise of jurisdiction. Neither in a court of general, nor one of limited jurisdiction, does the rule vary: for both are of *special* jurisdiction so far as attachment suits are concerned. And though a court of superior and general jurisdiction may have the defendant himself in court where he may have joined issue in the personal action, so that any illegal judicial act thereafter would be mere error in the exercise of jurisdiction in that action, still the jurisdiction over the ancillary proceeding is not thereby affected except as to summons and notice; all other statutory requisites must be observed under penalty of absolute nullity, so far as concerns the attachment. Jurisdiction over the *subject-matter* of the personal suit does not necessarily include that of the auxiliary proceeding.

To outline the remedy in a single sentence: The ground or reason for resort to the extraordinary process, the cause of action, the security, the writ and its execution, the opportunity for defense, the jurisdiction and the judgment must all be such as the statute requires in the State where the proceeding is had, in order to *create*, *perfect* and *vindicate* the lien to secure an ordinary debt.

CHAPTER II.

STATUTORY AUTHORIZATION.

§ 1. General Uniformity.
2. Non-residents.
3. Absentees.
4. Absconding Debtors.
5. Fraudulent Debtors disposing of their Property to avoid Creditors.
§ 6. Anomalous Grounds.
7. The Debt: What Debts are recoverable by Attachment.
8. Exceptional Attachments.

Sec. 1. General Uniformity.

There is a near approach to uniformity, in the statutes of the several States, in all the principal features of attachment authorization. By all of them, the action is accorded for debt due; by many of them, debt certain though not yet due, may be a cause of action under prescribed conditions; by some, the suit may be for tort, and a few grant the remedy on causes that must be treated as exceptional. Nearly all attachment suits however are for debts alleged to be due, such as might be instituted under any attachment law in the United States.

By all of the statutes, the remedy is accorded to ordinary creditors; it is the means of making any attached property of the debtor subject to a lien for an ordinary debt: this leading feature is universal. There are some States which authorize attachment to vindicate pre-existing liens, but not to the exclusion of the leading trait above mentioned.

The principal grounds for resort to this extraordinary remedy are the same everywhere. Minor grounds differ in different States, and it will be necessary to note them particularly hereafter; but the uniformity existing in all, with regard to the main ones, is greatly conducive to the treatment of Attachment Proceedings as a system.

Attachment legislation is based on the assumed indebtedness of property, and it authorizes procedure against it when the personal debtor cannot be effectively reached by ordinary process. With the exception of some anomalous provisions, (to be hereafter treated,) all the authorized statutory grounds for attachment may be reduced to this one ground: the inadequacy of ordinary process to enable the creditor to collect his claim.

There are three circumstances under which ordinary process is deemed inadequate or not certainly available and efficacious:

First—When the debtor is a non-resident.

Secondly—When he absconds, or is about to do so.

Thirdly—When he makes fraudulent disposition of his property, or is about to do so.

The first includes protracted absence under such circumstances as to hinder or prevent ordinary process; the second embraces the debtor's concealing, secreting, or absenting himself to defraud his creditor and defeat ordinary process; and the third consists of fraudulent removing, concealing, transferring, assigning or otherwise disposing of property, or designing to do so, by the debtor to defraud his creditor and defeat ordinary process.

The statutes sub-divide these grounds, (as will hereafter be shown ;) but, for the purpose of a methodical treatment of the subject, the writer will take them up successively under the three heads above suggested, and afterwards consider the anomalous authorizations not classible with these. The reader will at once perceive the propriety as well as the advantage of treating the case of non-residents and permanent absentees apart from that against absconders and that against concealers of property, when he reflects that no allegation of fraud or fraudulent intent is necessary in such case, while it is an essential element in laying the ground against either of the latter two classes of debtors. And he will see that, though fraud must be charged, at least to the extent of intent to elude process, in suits against the second two classes, yet it is convenient to consider them separately, since the allegation against the absconder is that he has absconded, removed, concealed or secreted *himself*, or is doing so, or is about to do so, to evade process and defraud,

etc.; while that against the other is that he has removed, concealed, secreted or fraudulently disposed of his *property*, or is doing so, or is about to do so, to defraud his creditor.

The statutes of the different States, though varying in minor particulars, are generally uniform in authorizing the remedy by attachment against these three classes of debtors. The authorizations against the three rest on the same, one, underlying principle: the right of the creditor to have an adequate remedy for making his money out of his debtor's property, when ordinary process is not certainly efficacious for that purpose.

It must be remarked that there are many instances in which ordinary process would prove adequate, though the debtor be a non-resident, or an absconder or a concealer of property. Though residing out of the State, the debtor may be present and amenable to ordinary process; though absconding, concealing or secreting himself, he might be cited by leaving summons at the place of his usual abode with some member of his family competent to receive it for him; though fraudulently disposing of some of his property, he may have other property liable to execution; though having the intent to defraud, he may not really carry it out. Under all such circumstances, ordinary process might prove sufficient, but the law allows the extraordinary, not merely when the ordinary process would certainly prove inadequate, but also when its result is precarious.

Several of the statutes couple absence with non-residence; and, where only the latter term is used, it is construed by the courts of some of the States to include the former. Absconding, either by express enactment or by judicial construction, is in many of the States treated as the hiding or running-away of the debtor under such circumstances that he cannot be even indirectly summoned. Secreting or otherwise fraudulently disposing of property is usually qualified so as to show that it is such secreting that there is nothing left or likely to be left out of which the creditor may make his money by execution after judgment under ordinary process. Under statutes thus expressed or construed, it ought to be always easy to determine, from the creditor's affidavit, whether there is any necessity for the issuance of the conservative writ.

To secure the creditor's rights, and to ensure the execution of any judgment he may obtain, when the condition of the debtor is such that there is great improbability that his property will remain answerable to judgment following ordinary process, the legislator authorizes the creation of an incipient specific lien by means of attachment, and thus conserves the debtor's property when attached—putting it beyond the power of the debtor to incumber or alienate it to the prejudice of the creditor.

Some line of demarcation must be drawn, (though necessarily only in a general way,) between property which ought to be thus conserved and property which requires no such conservation. In the incipiency of the attachment suit, when the writ is applied for, when only the creditor is before the court, nothing can be known of the facts except by his own *ex parte* showing; hence, what he swears to be true, and obligates himself by bond to make good, must constitute the *data* upon which to decide whether he is entitled to the issuance of the extraordinary process.

Most of the State statutes, authorizing attachment, make the creditor's sworn statement the criterion by which the inadequacy of the ordinary process, and the necessity for the extraordinary, are to be determined; or, what is equivalent, they make the affidavit the test whether the debtor is properly charged to be one whose property is attachable under the law and ought to be conserved by having a specific lien immediately put upon it. The testing of the truth of such averment comes usually at a later stage of the case.

It will be seen that it is the creditor's assertion, belief or even fear which oftentimes controls the question in the first instance; and the rule is, not that the debtor must certainly be a non-resident, an absconder or a concealer of property but that he must be duly charged as such. What was said in the beginning of this chapter to the effect that the law authorizes procedure, by attachment, against property as an indebted thing, when the personal owner cannot be effectively reached by ordinary process because of his being a non-resident, an absconder or a concealer of his property, will be understood as qualified by the remarks which have followed. It will thus appear that

the ineffectuality of the ordinary process need not be rendered absolutely certain before the extraordinary and conservative writ may be lawfully issued. The oath of the creditor is *prima facie* proof, and entitles him to the writ, though he swears only to his knowledge and belief of the grounds when that is all that the statute requires in the first instance. But further proof is necessary to sustain attachment.

Sec. 2. Non-Residents.

All the States authorize attachments against the property of non-resident debtors. There is general uniformity in the statutes, so far as concerns the right of action with the conservative remedy, against debtors not residing in the State or country in which the suit is instituted, who have property within it subject to execution for debt. The principle is everywhere recognized that the property is subject to the jurisdiction though its owner cannot be reached by process.

The debtor, whether living abroad or in a neighboring State, is deemed a foreign debtor. The attachment against his property, when he is not found in the State where the suit is brought and served with process, but is merely notified by publication, is a foreign attachment. The distinction between foreign and domestic attachment is not observed by all of the States. Where it is observed, the former is usually associated with garnishment or the trustee process. However, in all the states, the creditor has his remedy by attachment against the property of his non-resident debtor, whatever the term by which the process is designated. The process is none the less that of foreign attachment by reason of the avoidance of the term.

The statutes designedly employ the term "non-resident" instead of "foreign-resident;" for the condition upon which attachment issues is, not that the debtor be a resident of another State or country, but, that he be *not* a resident of the State in which the suit against him is brought and the attachment issued.

The statutes do not all use precisely the same phraseology in authorizing attachment against the property of non-residents. The words employed in many of the statutes are, "When the defendant is a non-resident of this State;" in others, "When the

defendant is not a resident," etc.; and "When the defendant is not an inhabitant," etc.; which are equivalent expressions as they appear in their respective contexts. The statutes of five States authorize attachment "when the defendant resides out of the State," but the phrase is construed to mean the same as those above quoted. In Michigan, the plaintiff must swear that his debtor is not a resident of the State and has not resided therein for three months preceding the making of the affidavit. In other States there are unimportant qualifications, but it may be generally said that in all the States and Territories and in the District of Columbia, non-residence is a ground for attachment.

Some of the statutes expressly mention foreign corporations, while others may be understood to include them under general designations construable as including artificial persons.[1] It will be seen that the practice is not uniform with regard to attachments against foreign corporations.

The prominent idea of the various statute authorizations, so far as the ground under consideration is concerned, is that the debtor must be a non-resident of the State where the attachment is sued out—not that he must be a resident elswhere. He need not be a foreign resident. He may be a cosmopolitan having no fixed place of abode. He may be a constant traveller claiming no home. He may be personally amenable to no particular jurisdiction. The essential charge is that he is not residing or living in the State; that is, he has no abode or home within it, where process may be served so as effectually to reach him. In other words, his property is attachable if his residence is not such as to subject him personally to the jurisdiction of the court, and place him upon equality with other residents in this respect.

The debtor may be the subject of a foreign power; he may

[1] Phillipsburg Bank *v.* Lackawanna R. R. Co. 27 N. J. L. 129; Cooke *v.* State National Bank, 50 Barb. 339; Bowen *v.* First National Bank of Medina, 34 How. (N. Y.) Pr. 408; Mineral Point R. R. Co. *v.* Keep, 22 Ill. 9; S. C. R. R. Co. *v.* McDonald, 5 Ga. 531; Martin *v.* Branch Bank, 14 La. 415; Hazzard *v.* Agricultural Bank, 11 Rob. (La.) 326; Libbey *v.* Hodgdon, 9 N. H. 394; Bushnell *v.* Com. Ins. Co., 15 S. & R. 174; Planters' & Merchants' Bank *v.* Andrews, 8 Porter, 404; Union Bank *v.* U. S. Bank, 4 Hump. 369; St. Louis P. Ins. Co. *v.* Cohen, 9 Mo. 421.

be a citizen of a State other than that in which the attachment suit is instituted; he may not only be a citizen and a voter there, but his domicile or principal residence may be there; yet if he has a residence also in the place where the suit is brought, at which he may be duly served with ordinary process, his property ought not be subjected to attachment. A place of abode at which a summons may be lawfully served "is the condition on which process of attachment cannot be issued. If a debtor has not such a residence, he is a non-resident within the statute and may be proceeded against by attachment. * * * The use of this writ when the defendant is within reach of ordinary process, is wholly inconsistent with the spirit and design of the statute."[1]

It is true that a debtor may be within reach of ordinary process by being temporarily within the State where the suit is brought, and yet his property be amenable to attachment; for he, being a non-resident, could not defend on the ground that he was actually served with summons.[2] The rule is that he must have an abode within the State where process can always legally reach him, in order to be exempt from this remedy. The accident of finding him within the jurisdiction will not deprive the plaintiff of his right to create a lien upon the debtor's property situated in the State.[3] Even if the debtor has a temporary residence in the State where the suit is brought, it has been held that if he is absent, and has his principal and usual place of abode in another State, he may be sued by attach-

[1] Baldwin *v.* Flagg, 43 N. J. L. 495; Perrine *v.* Evans, 35 Id. 221; Stout *v.* Leonard, 37 Id. 492; City Bank *v.* Merrit, 1 Green, 131; Bronson *v.* Shinn, Id. 250; Clarke *v.* Likens, 2 Dutch. 207; The Phillipsburg Bank *v.* The Lackawanna R. R. Co. 3 Id. 206; Kuglar *v.* Shreve, 4 Id. 129; Boundred *v.* Del Hoyo, Spence, 333; (or 20 N. J. L. 328;) *In re* Alex. Thompson, 1 Wend. 43; Haggart *v.* Morgan, 5 N. Y. 422; Ellington *v.* Moore, 17 Mo. 424.

[2] Murphy *v.* Baldwin, 41 How. Pr. 270; Chaine *v.* Wilson, 16 Id. 552; Houghton *v.* Ault, Id. 77; Lee *v.* Stanley, 9 Id. 272.

[3] Burcalow *v.* Trump, 1 Houston, 363; Greene *v.* Beckwith, 38 Mo. 384; Jackson *v.* Perry, 13 B. Mon. 231; Malone *v.* Lindley, 1 Phila. 192; Bryan *v.* Dunseth, 1 Martin, N. S. 412; Rayne *v.* Taylor. 10 La. Ann. 726.

ment as a non-resident.[1] One may have a temporary abode at a hotel, or boarding house; but, if it is not under such circumstances that the leaving of a summons there, addressed to him, with a person of proper age, would be legally binding upon him, and would be such service as to enable the officer to make a return that would be as binding upon the sojourner as it would be upon any resident-citizen thus served at his domicile, it is not such a residence as would exempt his property from attachment. The debtor may have a place of business within the State, with a clerk or agent representing him in his absence, yet if he has no place or abode within it where a summons may be left as at the domicile of a citizen-resident, his property may be attached.[2]

The character of the residence, whether such as will exempt from attachment or not, is often a nice question of fact; but the law is that the debtor's property is attachable if he has not a place within the State where he is legally answerable for citation left for him there under circumstances which would constitute a lawful summons upon any citizen-resident if left at his domicile.

And if he has such a place; if the fact of his having it is admitted, it does not matter that he has but recently acquired or established it. A new comer into the State, with the design of remaining, who has an abode at which a summons may be left so as to make legal service upon him, is a resident within the meaning of the attachment laws.[3] He may not have acquired citizenship, he may have no intention of acquiring a political domicile, he may not have become even a resident for all intents and purposes, yet if he has a home at which he may be reached by ordinary process at any time—(not for a brief period of a few days only)—he is not a non-resident in the sense in which the statutes employ the term. This is the true criterion by which to decide whether or not his property is attachable on

[1] Stout *v.* Leonard, 37 N. J. L. 492; Murphy *v.* Baldwin, 11 Abb. Pr. (N. S.) 407.

[2] Chase *v.* Ninth Nat. Bank, 56 Pa. St. 355. See Watson *v.* Pierpont, 7 Martin, (La.) 413.

[3] The People *v.* McClay, 2 Neb. 7; Swaney *v.* Hutchins, 13 Neb. 266; Heidenback *v.* Schland, 10 How. Pr. 477.

the ground now under consideration: if the debtor has a place of usual abode in the State, at which ordinary process may be served, his property is not attachable as that of a non-resident; but if he has not, it is attachable as such.

Intention to remain, on the part of one about to come into the State, is of no significance when not accompanied with the acts of immigration and the establishment of a place of residence;[1] but as soon as he arrives with such intention, and establishes a home meant to be permanent, though he may be the lessee of the house in which he lives or a boarder, he is at once a resident within the purview of the attachment laws.[2] On the other hand, the act of coming into the State is of no significance without the intent to stay. So if one leaves with the intent of changing residence, the change is of immediate effect.[3]

It is said that, in attachment law, domicile may be in one State and residence in another.[4] This should be understood as meaning that one's principal residence, where he may have citizenship and exercise political rights, may be in one State while he has such residence in another as to render him susceptible of being served with summons at the latter and thus amenable to ordinary process there. Whether or not a man is a resident often depends upon peculiar circumstances, and is determinable by the facts proved in the case, as is amply illustrated in decisions.[5]

The wife's legal residence is fixed by that of her husband.[6]

[1] Adams *v.* Evans, 19 Kan. 174.

[2] Chesney *v.* Francisco, 12 Neb. 626; Kennedy *v.* Baillie, 3 Yeates, 55.

[3] Green *v.* Beckwith, 38 Mo. 384; Matter of Fitzgerald, 2 Caines, 318; Boardman *v.* Bickford, 2 Aikens, 345; Burrows *v.* Miller, 4 How. Pr. 349; McCollem *v.* White, 23 Ind. 43; Reed *v.* Ketch, 1 Phila. 105; Taylor *v.* Knox, 1 Dall. 158; Farrow *v.* Barker, 3 B. Mon. 217; Nailor *v.* French, 4 Yeates, 241; Pfoutz *v.* Comford, 36 Pa. St. 420; Moore *v.* Holt, 10 Gratt. 284.

[4] Morgan *v.* Nunes, 54 Miss. 308.

[5] Burrows *v.* Miller, 4 How. Pr. 349; Brown *v.* Ashbough, 40 Id. 260; Thurneyssen *v.* Vouthier, 1 Miles, 422; Shipman *v.* Woodbury, 2 Id. 67; Clarke *v.* Pratt, 18 La. Ann. 102; Kennedy *v.* Baillie, 3 Yeates, 55; Wells *v.* The People, 44 Ill. 40; Smith *v.* Story, 1 Humph. 420; Wheeler *v.* Degnan, 2 Nott & McC. 323; Bainbridge *v.* Alderson, 2 Browne, 51; Stratton *v.* Brigham, 2 Sneed, 420.

[6] Baldwin *v.* Flagg, 43 N. J. L. 495;

"Residence" as used in the statutes is not synonymous with "domicile." One may have several residences but he can have but one domicile. His principal residence is his domicile. It is not necessary that his principal residence should be in the State or within the jurisdiction where attachment is sued out, in order to defend on the ground that he is a resident. If he has a place of abode there, where he may usually be found, and where he would be bound by a summons left thereat, he is a resident within the meaning of the word as ordinarily used in the statutes. He can be reached by ordinary process and therefore the reason for employing the extraordinary one of attachment does not apply.[1] On the other hand, a debtor may have his property attached as that of a non-resident, if he has not a place of abode in the State at which summons can be served;[2] though he has a resident representive authorized to act for him in his line of business, (as before remarked,) in the State in which the attachment is sued out.[3] Difference between residence and domicile has been frequently pointed out in decisions.[4]

When used unqualifiedly in the statutes on attachment, "residence" usually means "home" or "abode;" and "resident" means "inhabitant."[5]

Hackettstown Bank *v.* Mitchell, 4 Dutch. (28 N. J. L.) 516; Hunt *v.* Hunt, 72 N. Y. 217; Somerville *v.* Somerville, 5 Ves. 787; Greene *v.* Greene, 11 Pick. 409; Hanover *v.* Turner, 14 Mass. 231; Cambridge *v.* Charlestown, 13 Id. 501; Williams *v.* Whiting, 11 Id. 424; Knox *v.* Waldoborough, 3 Greenl. 455; Swaney *v.* Hutchins, 13 Neb. 266.

[1] Brundred *v.* Del Hoyo, 20 N. J. L. 328; Edington *v.* Moore, 17 Mo. 424.

[2] Baldwin *v.* Flagg, 43 N. J. L. 495; Clark *v.* Likens, 26 Id. 207; Stout *v.* Leonard, 37 N. J. L. 492: A debtor having a residence in New Jersey which is not his usual place of abode, may be sued by attachment there, as a non-resident if absent from the State at the time—he having another residence beyond the State. So, also, in New York: Murphy *v.* Baldwin, 11 Abb. Pr. (N. S.) 407; 41 How. Pr. 270; Matter of Thompson, 1 Wend. 43.

[3] See p. 37 and note; and see Fielding *v.* Lucas, 37 N Y. 197.

[4] Wolf *v.* McGavock, 23 Wis. 516; Alston *v.* Newcomer, 42 Miss. 186; Dorsey *v.* Kyle, 30 Md. 512; Weber *v.* Weitling, 3 C. E. Green, 441; Foster *v.* Hall, 4 Humph. 346; Haggart *v.* Morgan, 1 Seldon, 422.

[5] Barnet's Case, 1 Dall. 153; Lyle *v.* Foreman, Id. 480; Risewick *v.* Davis, 19 Md. 82; Matter of Wrigley, 8 Wend. 134; Harvard College *v.* Gore, 5 Pick. 379; Roosevelt *v.* Kellogg, 20 Johns. 208; Boardman *v.* Bickford, 2 Aik. (Vt.) 345; Wiltse *v.*

With such definition, it is not insistent to say that one may have residence in a State without citizenship. But it seems incompatible to say that one may have domicile without residence, since the former includes the latter. If he has his domicile in any State, he has a place of residence there, though he may be absent from it. The absence may be so protracted, or be under such circumstances, that attachment would lie against his property. It may therefore be correctly said that attachment against the property of one absent from his domicile and out of the State in which it is located may be maintained as against a "non-resident," where the statute provision uses the term so as to signify one not actually present and residing in the State when the writ is issued.[1]

The phrase in a statute: "If the defendant is not in this State," has been held to apply only to a non-resident; not to one temporarily absent.[2]

The debtor's business establishment does not determine his place of residence. The fact that one does business wholly or mainly within a certain State is a circumstance to be considered, with other facts, in determining his intentions and his actual residency. A business establishment alone does not constitute a residence, which is a place of abode;[3] and the circumstance that a merchant does business in one State will be entitled to no consideration in determining whether his property is liable to attachment, if he keeps his home, at the same time, in another State.[4] One doing business for another may be liable

Stearns, 13 Iowa, 282; Guise *v.* O'Daniel, 1 Binney, 349; Catlin *v.* Gladding, 4 Mason, 308; Inhabitants of Turner *v.* Inhabitants of Buckfield, 4 Greenleaf, 231.

[1] Munroe *v.* Frosh, 2 La. Ann. 962; Rayne *v.* Taylor, 10 Id. 726; Haggart *v.* Morgan, 5 N. Y. 422; Sandel *v.* George, 18 La. Ann. 526; Risewick *v.* Davis, 19 Md. 82; Harvard College *v.* Gore, 5 Pick. 379; Frost *v.* Brisben, 19 Wend. 11; Matter of Wrigley, 4 Wend. 608; 8 Id. 134; Matter of Thompson, 1 Wend. 43; Morgan *v.* Nunes, 54 Miss. 308.

[2] Potter *v.* Sanborn, 49 Ct. 452, in exposition of Ct. Genl. Stat. p. 419, § 19.

[3] Perrine *v.* Evans, 35 N. J. L. 221: "Non-resident" means one who has not his abode in the State: so attachment may issue against the property of those who do business in the State but have not their abode in it. See Robbins *v.* Alley, 38 Ind. 553; Murphy *v.* Baldwin, 41 How. Pr. 270.

[4] Wallace *v.* Castle, 68 N. Y. 370: If the debtor resides in another State,

to be sued by attachment in his individual capacity, while his principal is not thus liable though the summons be served on the agent. The lessee of a railroad may be personally amenable to such suit, though the railroad corporation may be not liable.[1]

It is not to be inferred from the fact that the general office of attachment is to meet the want of a creditor when ordinary process will not avail him, that therefore it is invariably true that a non-resident cannot be proceeded against by the attachment of his property when he is temporarily present and may be summoned. The general office is as stated; the reason which underlies it is of general application; the non-resident is ordinarily beyond the reach of process so that the general rule has such reason for its existence. The statutes generally make no exception in case of the temporary presence of the non-resident; and, in such case, attachment lies against his property as though he were in a foreign jurisdiction.[2] Indeed, the present absence of the non-resident from the State need not be averred,[3] unless the statute couples absence and non-residence as a ground for foreign attachment,[4] or unless the statute is construed to mean, by "non-resident," or "not a resident," one who is not at home though having a residence; one who is not literally within the jurisdiction when the attachment is sued out. Under such construction, the question is whether the debtor is present or absent rather than whether he is a resident or non-resident.[5]

The creditor is entitled to his writ when he has laid the ground of non-residence, or alleged protracted absence such as prevents the effectual use of the ordinary process, though subse-

he is not to be deemed a resident of New York because he has a place of business there.

[1] Breed *v.* Mitchel, 48 Ga. 533: A non-resident lesse of a railroad in Georgia which may be sued there, is yet liable to be proceeded against by attachment like other non-residents.

[2] Burcalow *v.* Trump, 1 Houston, (Del.) 363; Green *v.* Beckwith, 38 Mo. 384.

[3] Clark *v.* Arnold, 9 Dana, (Ky.) 305.

[4] Fuller *v.* Bryan, 20 Pa. St. 144; Bainbridge *v.* Alderson, 2 Browne, (Pa.) 51. See Scruggs *v.* Blair, 44 Miss. 406: Attachment in equity.

[5] Hoggett *v.* Emerson, 8 Kan. 262, construing Kansas Code Pro. § 21.

quent events may show that the debtor's absence was not for such length of time as the affiant had believed it would be.[1] But if the creditor is in error respecting the material averment upon which the attachment is issued, if he makes affidavit that the debtor is a non-resident when the contrary is the case in fact, and proceeds to give publication notice, and prosecutes the case to judgment, the whole proceeding is a nullity.[2]

It is generally true that the accidental presence of a non-resident, (so that it is practicable to serve him with summons and thus render him amenable to ordinary process,) does not preclude the creditor from attaching. The debtor, present temporarily and personally served with process, may immediately leave; and, if the attachment of his property could not be effected under the circumstances, what is to prevent him from taking it away with him? The spirit of the attachment laws, (and generally the letter,) allows the conservatory writ in such a case. But, with regard to this, as to all other things connected with attachment, the statute of each particular State must govern within its own borders.

Sec. 3. Absentees.

What constitutes such absence as to amount to non-residence within the meaning of the attachment laws, depends much upon the intention of the debtor.[3] Whether his intention is to maintain his residence or abandon it may be inferred from protracted absence with continued silence as to his purpose, and total neglect of his affairs within the State;[4] or from his own

[1] Leathers *v.* Cannon, 27 La. Ann. 522: Attachment sustained against the property of an absentee travelling abroad who had designed to be absent from the State two years or more, and who left no agent, and could not be reached by ordinary process; and his return at an earlier date than he had designed was held not to affect the process issued before his return.

[2] Though an attachment suit be prosecuted to judgment on the ground that the debtor has permanently left the State of Louisiana, the decree is void if the debtor is really a resident, and has not been cited and has not appeared in the suit. Succession of Durand, 24 La. Ann. 352.

[3] Wells *v.* People, 44 Ill. 40; Morgan *v.* Avery, 7 Barb. 656; Swaney *v.* Hutchins, 13 Neb. 266.

[4] Walker *v.* Barrelli, 32 La. Ann. 467: Intent to abandon domicile was inferred from ten years' absence from

declarations that he has left the State permanently or that his home and that of his family are in another State;[1] or, on the other hand, from such circumstances as that his family have not removed, that summons may be left with them so as to bind him, that his intention is to return, etc.[2] Acts indicating the intent of permanent removal outweigh the debtor's avowals to the contrary.[3] Such intent cannot properly be inferred from the fact of a temporay absence; and that alone constitutes no ground for attachment.[4] Even though a resident may design to remove permanently from the State, and may be absent on the business of looking up a new home in another jurisdiction, his property does not therefore become immediately liable to attachment as that of a non-resident, since his old home is not yet relinquished and ordinary process may reach him there.[5] While a brief absence, coupled with facts indicating that residence within the State has been abandoned, may justify attach-

the State by the debtor without communicating his intentions or whereabout or anything concerning his property or its administration; and the attachment of his property as that of a non-resident was sustained.

[1] Loder *v.* Littlefield, 39 Mich. 512: Property deemed subject to attachment as that of a non-resident, when the owner has declared that his home is in another State, and testifies that his wife owns a house and lives there, and that for years he has frequently visited her there. Also: Farrow *v.* Barker, 3 B. Mon. (Ky.) 217; Naylor *v.* French, 4 Yeates 241.

[2] Bowers *v.* Ross, 55 Miss. 213: The defendant may show that he still has his domicile in Miss, with intent to return to it, and keeps an establishment within the State where his family resides and where process may be served so as to bind him, though he has a fixed abode in another State for an indefinite period.

[3] Wolf *v.* McGavock, 23 Wis. 516; New Orleans Canal and Banking Co. *v.* Comly, 1 Rob. (La.) 231; Reeves *v.* Comly, 3 Id. 363; Simons *v.* Jacobs, 15 La. Ann. 425.

[4] Alston *v.* Newcomer, 42 Miss. 186; Fuller *v.* Bryan, 20 Pa. St. 144; Mandell *v.* Peet, 18 Ark. 236. Matter of Chipman, 1 Wend. 66; Matter of Warner, 3 Wend. 424; Burgess *v.* Clark, 3 Ind. 250; Havis *v.* Taylor, 13 Ala. 324; Watson *v.* Pierpont, 7 Martin, 413; Offutt *v.* Edwards, 9 Rob. (La.) 90; Fitch *v.* Waite, 5 Ct. 117; Matter of Schroeder, 6 Cow. 603; Matter of Fitzgerald, 2 Caines, 318; Pitts *v.* Boroughs, 6 Ala. 733; Walcott *v.* Hendrick, 6 Tex. 406; Ross *v.* Clark, 32 Mo. 296; Boggs *v.* Bindskoff, 23 Ill. 66; Kingsland *v.* Worsham, 15 Mo. 657; Ellington *v.* Moore, 17 Mo. 424; Boardman *v.* Bickford, 2 Aikens, 345; Oliver *v.* Wilson, 29 Ga. 642.

[5] Pfoutz *v.* Comford, 36 Pa. St. 420; Smith *v.* Story, 1 Humph. 420.

ment,[1] a very protracted stay from the State, even extended for years, is not necessarily a fact supporting the charge of non-residence, since the absentee may, all the time, maintain a place of residence within the State at which ordinary process may be legally served.[2]

There is, as a general rule, no fixed length of absence which will, of itself, create the presumption of non-residency, within the meaning of the attachment laws—the important question being whether ordinary process can reach the debtor at all times by service at some place within the State where the suit is brought.[3] So long as there is such a place, there can be no reason why the extraordinary process should be invoked on the ground of absence or non-residency, unless there is statutory enactment making absence alone a legal cause for attaching. What matter if the absentee is acquiring or has acquired a residence abroad? He may have more than one residence; and therefore it cannot be inferred, because he has established one in another State or country that he has abandoned the place where service may be had upon him in the State where the suit against him is instituted. On the contrary, absence from the State, even with intent to return, and when no residence is acquired or is being acquired elsewhere, may render a debtor liable to have his property attached as that of a non-resident, when the circumstances are such that the creditor is cut off from the benefit of ordinary process to make his money.[4] The debtor must be so situated at the time the suit is to be served that he can be reached at some place of residence, if he would avoid the extraordinary process. It is at that particular time—when the

[1] Morgan *v.* Nunes, 54 Miss. 308; Wheeler *v.* Cobb, 75 N. C. 21; Taylor *v.* Knox, 1 Dall. 158; McCollem *v.* White, 23 Ind. 43; Farrow *v.* Barker, 3 B. Mon. 217.

[2] Egan *v.* Lumsden, 2 Disney, (O.) 168.

[3] In Ky., Ark. and Col. four months' absence is a ground for attachment; and in Michigan, three months' absence *and non-residence.*

[4] Ludlow *v.* Ramsey, 11 Wall. 581. Held that property could be attached as that of a non-resident because of its owner being out of the State and in the Confederate army. Also: Foreman *v.* Carter, 9 Kan. 674. *Contra:* Haynes *v.* Powell, 1 Lea, (Tenn.) 347. But not if he is in the Federal army: Tibbitts *v.* Townsend, 15 Abb. Pr. 221; Thompson's Case, 1 Wend. 43

attachment proceeding is begun—that he must be a resident if he would avoid such process.[1] It would not avail him to become a resident at a later period;[2] to show that he was absent without a place in the State for service when his goods were attached but that he returned soon thereafter; or that he is, at the time of the trial, or the traverse of the attachment, a resident of the State with the design of remaining permanently.

As in the case of a new-comer, acquiring residence, the *animus* of the debtor is of importance in deciding whether or not he is a resident, so when a person leaves the State, his intent is often decisive of the question whether or not he has abandoned his residence therein. As previously remarked, in another connection, one immediately becomes a non-resident if he leaves his State with the design of becoming such,[2] though the design has been held not to be decisive on this question, until accompanied with the act of leaving; until he has passed beyond the State bounds.[3] But if he has broken up his home, so that process can no longer be served there and be binding upon him, must his creditor be confined to personal service upon his debtor as the only means of reaching him? The case is not that of an absconding debtor; the plaintiff connot truthfully set up the ground, in his affidavit, that the defendant is running away to avoid process, concealing himself, hiding his goods, etc., in fraud of creditors. The defendant avowedly means to abandon his residence, which he may lawfully do, and has broken up his home, and is openly travelling towards the State bounds to depart permanently: why should not the extraordinary process be invokable on the ground of non-residence?[4]

It is conceivable that a person may never have been out of his native State yet have no fixed place of abode within it where

[1] Clark *v.* Arnold, 9 Dana, 305.

[2] Moore *v.* Holt, 10 Gratt. 284; Ballinger *v.* Lautier, 15 Kan. 608.

[3] Ballinger *v.* Lautier, 15 Kan. 608; Kugler *v.* Shreve, 28 N. J. L. 129; Kingsland *v.* Worsham, 15 Mo. 657; Temple *v.* Cochran, 13 Id. 116; Smith *v.* Story, 1 Humph. 420; Stratton *v.* Brigham, 2 Sneed, 420; Lyle *v.* Foreman, 1 Dall. 480; Bainbridge *v.* Alderson, 2 Browne, 51; Wheeler *v.* Degnan, 2 Nott & McC. 323; Shipman *v.* Woodbury, 2 Miles, 67; Reddy *v.* Bego, 33 Miss. 529.

[4] See, favoring this view, Clark *v.* Ward, 12 Gratt. 440; Spalding *v.* Simms, 4 Met. (Ky.) 285. See also Moore *v.* Holt, 10 Gratt. 284.

ordinary process may be legally served upon him when he cannot be personally served with summons. His business may require him to travel constantly from county to county, to sojourn at hotels for but a few hours at a time, so that no particular place could be called his home. Whether, under such circumstances, his property would be liable to attachment on the ground of non-residence, must depend upon the attachment statute of his State, (as indeed, in all other cases,) but there would seem to be no reason, on general principles, why his property ought not be made liable to attachment.

Only by his property can a non-resident debtor be reached and made to pay.[1] If he is temporarily present, a summons may reach him, to be sure; but of what avail would that be if his property is not attached, or if he has none within the State to be attached? If he has residence in another state or country, he may plead to the jurisdiction of the State court where the ordinary suit is brought. Or, he could readily return to his home and take his property with him, so that there would be nothing left within the jurisdiction upon which the judgment could be executed. The necessity therefore for the use of the writ of attachment, by which his property is conserved and held under a hypothetical lien till judgment, is obvious, though the non-resident debtor be personally served with summons. Ordinary process, though it may be served in such case, would not prove effectual; and hence the extraordinary is permitted and authorized.

The reader will readily perceive that it would be almost an endless task, were the many curious facts of cases, involving the attachability of non-residents' property, to be given by way of illustration in a text-book. It seems better to rely upon the general rule that the facts must be such as to render the conservative process necessary, under the statute provision.[2]

[1] Winstonley *v.* Savage, 2 McCord, ch. (S. C.) 425.

[2] Branch Bank *v.* McDonald, 22 Ala. 474; Zerega *v.* Benoist, 7 Robt. (N. Y.) 199; Knox *v.* Mason, 3 Robt. (N. Y.) 681; McKenzie *v.* Bentley, 30 Ala. 139; Coosa River St. B't. Co. *v.* Barclay, 30 Ala. 120; Tallemon *v.* Cardenas, 14 La. Ann. 509; Sandel *v.* George, 18 La. Ann. 526; Clark *v.*

In every State, the writ of attachment may be sued out against a non-resident. It is nowhere required that the affiant should swear that the debtor has become, or continues to be, a non-resident for the purpose of hindering or defrauding the creditor, or of preventing the collection of the debt.

No charge or implication of fraud, on the part of the non-resident need appear in the affidavit made for the attachment of his property. He may be honest, admitted by the plaintiff to be such, yet liable to have his property attached because the plaintiff can proceed effectively in no other way. It is solely because he cannot be summoned that his property is attached; his accidental presence, when he may be summoned, forming no exception, as has already been shown.

Sec. 4. Absconding Debtors—including those who secrete or conceal themselves to avoid process.

The statutes, though employing varying expressions, are generally uniform in authorizing the attachment of the property of a debtor who endeavors to avoid the process by absconding or by concealing or secreting himself. Some of the statutes make each of these methods of avoidance a distinct ground for attachment; others connect the latter two, and keep the first distinct; others specify but one of the three; but all unite in giving the remedy when the intentional avoidance of process by hiding or absconding, to avoid ordinary process, is made to appear. In States where attachment is an ordinary civil process in all cases upon contract or for debt, no special statute authorization, based upon this ground, may be found; but they constitute no exception, since attachment will there lie against the property of an absconding or secreted debtor, under the common practice, though not there a special ground of attachment.

Notwithstanding the general uniformity of the statutes, there

Pratt, 19 Id. 102; Surty *v.* Skilton, 19 Id. 136; Redwood *v.* Consequa, 2 Browne, (Pa.) 62; Allen *v.* Wright, 134 Mass. 347; Brolaskey *v.* Landers, 2 Miles, (Pa.) 371; Shugart *v.* Orr, 5 Yerg. 192; Caldwell *v.* Barclay, 1 Dall. 305, *note*, (in which it was said that the effects of an American consul, residing abroad, were liable to foreign attachment.) Spalding *v.* Simms, 4 Met. (Ky.) 285; Railroad *v.* People, 31 Ohio St. 542.

are minor differences: some treating absconding as running-away from the State to avoid process, while others treat it as running-away from the county, or the usual place of abode.

Nearly every State statute on attachment requires that the creditor, when charging that his debtor has absconded or concealed himself, or is about to do so, shall qualify the charge with the words, "so that ordinary process cannot be served," or equivalent words. "With intent to escape process," "to elude summons," "so that ordinary process cannot be effective," "to avoid and defraud creditors," *etc.*, are phrases frequently found in the statutes, which may be instanced as equivalents of the qualifying words above mentioned.

The gist of the charge is that the debtor, by his own act, has rendered, or will render ordinary process ineffectual. And if this is true, it would matter little whether he has escaped from the State or from his county, unless the former is necessary to the granting of the writ under any particular statute. Nor would it matter that he has a place of usual abode where a summons may be left; for, if it is true that he is hiding himself or running off, to avoid summons, it is quite likely that he would also run-off his property, or dispose of it in some way, before ordinary process could result in judgment and execution. The law authorizes attachment on the ground of fraudulent absconding, etc., even though the absconding debtor should be reached by summons, upon the required showing that ordinary process would not certainly prove effective.

When the application is made and the writ granted, it cannot be known certainly that summons will not reach the debtor. It is highly probable that it will reach him personally, when the charge is that he is about to abscond or conceal himself. The legislator does not mean to confine the remedy of domestic attachment to cases where the defendant cannot be personally served, but to those in which ordinary process is not so good a remedy as the extraordinary.

To entitle the plaintiff to an attachment on the ground that his debtor has absconded, it is not ordinarily required of him first to obtain an officer's return that the debtor cannot be

found.[1] When such return is required, the practice is exceptional.[2] There may be absconding without leaving the State. Removing from home with the design of avoiding summons and of defrauding the creditor is what is generally understood by absconding.[3]

Mere removal to another county, without fraudulent intent, is not a ground for attachment,[4] though it has been held that a non-resident traveller passing through a county is removing therefrom so as to be liable to have his effects, which he is taking with him, attached on the ground "that he is actually removing from the county."[5] Permanent removal is ordinarily what the law means when authorizing the ground.[6] It is not sufficient to swear that the debtor is already in another State and is about to sell or remove his property, when this ground is made the basis of the attachment.[7]

In Kentucky it was held that in an action for the recovery of money, against several partners, when some one of them has departed from the State with intent to defraud his creditors, or has concealed himself so that a summons cannot be served upon him, the plaintiff is entitled to an attachment against the property of all the defendants.[8] In New Jersey, held that an attachment will not lie against an absent or absconding joint-debtor or partner, if one or more of the joint-debtors or partners, liable for the same debt, reside within the State.[9]

Secréting himself, hiding from the creditor or the officer

[1] North *v.* McDonald, 1 Biss. 57.

[2] Rev. Stat. of Rhode Island, Ch. 178; Rev. Stat. of Delaware, Ch. 104; Barney *v.* Patterson, 6 Har. & J. (Md.) 182.

[3] Stouffer *v.* Niple, 40 Md. 447: The statute prescribing that the debtor who shall "secretly remove himself from his place of abode with intention to evade the payment of his just debts, shall be considered as having absconded," (Md. Code, Art. 10, § 3,) is construed to entitle the creditor to the writ of attachment when the debtor has left his home with such intent, though he may not have left the State. On the same subject, consult Mandell *v.* Peet, 18 Ark. 236; Branson *v.* Shinn, 13 N. J. L. 250; City Bank *v.* Merritt, Id. 131; Bennett *v.* Avant, 2 Sneed, (Tenn.) 152; Fitch *v.* Waite, 5 Ct. 117.

[4] Meek *v.* Fox, 42 Miss. 513.

[5] Johnson *v.* Lowry, 47 Ga. 560.

[6] Warder *v.* Thrilkeld, 52 Iowa, 134.

[7] State *v.* Morris, 50 Iowa, 203.

[8] Mills *v.* Brown, 2 Met. 404; Duncan *v.* Headley, 4 Bush, 45.

[9] Barber *v.* Robeson, 15 N. J. L. 17.

who is to serve process, going from home to avoid summons, shutting himself up at home, and all such acts of a debtor are included in the general term, "absconding;" and it is not necessary to the right of attaching that he should have run away from the State.[1]

The circumstances are rare under which one who is not a resident can be deemed an absconder.[2] However, if one is a resident in such a sense that he is subject to ordinary process, yet seeks to avoid it by secreting himself, he might be properly charged with absconding.[3]

It is not required of the attaching creditor that he should charge removing or absconding for the purpose of eluding his summons, or defrauding himself; the charge of removing to defraud creditors is sufficient, as a general rule, under the several statutes. Removal from the county to elude one creditor justifies attachment by another creditor.[4] If the debtor has shown himself untrustworthy, and capable of trying to evade the law and avoid the payment of one just debt, there is good reason for issuing the conservative writ to secure another. But where the statute requires the creditor to swear that the removing, secreting, absconding, etc., from the place of abode is to injure himself, and to elude him, and evade the law with respect to his claim, the averments must be made and sworn accordingly.

No injustice need be done the defendant, since he is secured against loss,—pecuniary loss, at least,—by the creditor's bond; and he is at liberty to traverse the affidavit, and may deny that he has illegally removed himself from his abode or from his county, (as the charge may be,) or that he is about to go; or,

[1] Ives *v.* Curtis, 2 Root, (Ct.) 133; Fitch *v.* Waite, 5 Ct. 117; House *v.* Hamilton, 43 Ills. 185; Young *v.* Nelson, 25 Ill. 565; Nutter *v.* Connet, 3 B. Mon. 199; Dunn *v.* Salter, 1 Duv. (Ky.) 342; Field *v.* Adreon, 7 Md. 209; Fitzgerald's Case, 2 Cai. (N. Y.) 318; Jemel *v.* Howe, 3 Watts, (Pa.) 144; Thurneyssen *v.* Voathier, 4 Watts, (Pa.) 422; Wray *v.* Gilmors, 1 Miles, (Pa.) 75; Boggs *v.* Bindskoff, 23 Ill. 66.

[2] Shugart *v.* Orr, 5 Yerger, 192. See Matter of Schroeder, 6 Cow. 603; Matter of Fitzgerald, 2 Caines, 318.

[3] Middlebrook *v.* Ames, 5 Stewart & Porter, 158.

[4] Sherrill *v.* Beach, 37 Ark. 560

admitting having gone, he may aver that his absence was temporary and without fraudulent design;[1] for "removal" means permanent removal.[2]

Most of the statutes are rather vague in their use of the phrase, "about to abscond." About to do so—when? Is it to-day, to-morrow or next week? Is it at some time before a judgment lien can be obtained by following up ordinary process? Perhaps no more definite period can be fixed upon, by way of construing the phrase, than that last suggested by inquiry. If the debtor is about to go before the ordinary judgment lien can be created in due course, there is reason for creating the hypothetical attachment lien at once.[3]

Absconding requires the act as well as the *animus;* though being "about to abscond" is complete without action.[4] The intent, being difficult of direct proof, may be inferred from circumstances;[5] and the defendant is entitled to the credit of circumstances in his favor.[6]

Sec. 5. Fraudulent Debtors—disposing of their property to avoid their creditors.

The statutes, with great uniformity, accord the attachment remedy when the debtor seeks to elude the effect of ordinary

[1] Klepper *v.* Powell, 6 Heisk. (Tenn.) 503; Gill *v.* Wyatt, Id. 88.

[2] Warder *v.* Thrilkeld, 52 Iowa, 134.

[3] Myers *v.* Farrell, 47 Miss. 281: Held that the leading purpose of the statute granting attachment when debtors are about to remove their persons or property out of the State with intent to evade the payment of debt, is to authorize proceedings *in rem;* and that any attempt to fix a definite rule as to the time within which the inquiry is to be limited would be hurtful to practice and might defeat the remedy in meritorious cases. All that is necessary is that the ground of attachment shall exist when the writ is sued out. If the fraudulent design to remove then exists, attachment will lie, though the debtor may not mean to carry out his design for several weeks or months.

[4] See, on absconding, and "about to abscond," and the requisites for charging these grounds: Bennett *v.* Avant, 2 Sneed, (Tenn.) 152.

[5] Gibson *v.* McLaughlin, 1 Browne, 292; Ross *v.* Clark, 32 Mo. 296; Young *v.* Nelson, 25 Ill. 565.

[6] Myers *v.* Farrell, 47 Miss. 281; Boardman *v.* Bickford, 2 Aikens, 345; Matter of Warner, 3 Wend. 424; Havis *v.* Taylor, 13 Ala. 324; Burgess *v.* Clark, 3 Ind. 250. And see further: Morgan *v.* Avery, 7 Barb. 656; Simons *v.* Jacobs, 15 La. Ann. 425; Reeves *v.* Comly, 3 Rob. (La.) 363; N. O. Canal & Banking Co. *v.* Comly, 1 Id. 231; Bennett *v.* Avant, 2 Sneed, 152.

process by secreting, removing or otherwise fraudulently disposing of his property within the State, or by removing it out of the State so that the creditor is in danger of losing his claim or of being necessitated to sue in another State. The writ is accorded, whether the debtor has done such acts or is about to do them for the purpose stated. The authorizations vary, in different states; but the ground, that the debtor is about to conceal or remove or dispose of his property to defraud the creditor, is almost universal. These general terms include the fraudulent assignment of property, withholding it, simulated sales of it, and like acts tending to defeat the usual course of justice.

Difference will be noted between the debtor's fraudulent removal or concealment of himself, and his fraudulent removal, concealment or disposal otherwise of his property. The former has been already considered. Both grounds belong to domestic attachment; and they together constitute all the unexceptional grounds, though the statutes usually subdivide them under several different heads, such as concealing, removing, assigning, withholding, disposing, etc., in fraud of creditors.

In all of these authorizations, the gist of the charge is that ordinary process is rendered inadequate or precarious. Such charge is not supported by the mere equivocations of the debtor, failing in promises to make payment, threats to make a preferential assignment, and similar reprehensible conduct.[1]

The charge of the debtor's removing property to avoid the execution of such judgment as may be obtained upon ordinary process, is not confined to removal from the county in which an absconding creditor last resided, but it will hold good if the removal was from the county in which the attachment suit is instituted.[2] Nor is the charge of intent to remove confined to

[1] Durr *v.* Jackson, 59 Ala. 203: Fraudulent withholding property from ordinary process is inferrable, not from a mere refusal to pay debts, but from an evil intent to delay creditors. Parsons *v.* Stockbridge, 42 Ind. 121: False promises to pay do not tend to show that the debtor was about to dispose of his property to defraud creditors. Evans *v.* Warner, 21 Hun. (N. Y.) 574: Intent to dispose of property fraudulently is not to be inferred from a threat by the debtor that he will make a preferential assignment.

[2] Ketchum *v.* Vidvard, 4 Thomp. & C. (N. Y.) 138: Removal of property from the county in which at

any particular time, provided the accomplishment of the intent would defeat the legitimate result of ordinary process; that is, if the defendant is substantially charged with the design of putting his property beyond the reach of the creditor before he can obtain an ordinary judgment and seize it under execution, it will be a sufficient compliance with the statutory requirement.[1] The design must be charged as existing at the time the affidavit is made, in order to a strict compliance with the statute authorizing attachment.[2]

The charge of removing, assigning or otherwise disposing of property, or intent to do so, need not be made with reference to all of the debtor's creditors, nor to all of his property. It is sufficient if the design is to fraudulently dispose of a part of the property, and if it is to defraud the plaintiff only.[3] However, where the statute requires that the charge of fraudulent disposition of property shall be qualified with the clause, "Without leaving sufficient to satisfy the plaintiff's demand;" or, "So as to defeat ordinary process;" or like provisions, it would not be a compliance with the law to charge merely that the defendant has fraudulently assigned[4] or removed, or is

tachment is applied for is sufficient ground against an absconding debtor —not necessarily removal of it from the county where the debtor last resided—when the proceeding is under § § 34–39 of Laws of 1831, Ch. 300.

[1] Fraudulent design to remove property from the State is a ground for attaching it, though the debtor may not mean to remove it for some weeks or months. The time must not be too closely circumscribed. It is sufficient if the ground exists when the writ is issued. The purpose of the legislator was to authorize proceedings *in rem.* Myers *v.* Farrell, 47 Miss. 281.

[2] Lewis *v.* Kennedy, 3 G. Greene, (Iowa,) 57; Warner *v.* Everett, 7 B. Mon. 262. Construction of attachment laws should be liberal, respecting the application of the remedy; strict, respecting the grounds for issuing writs of attachment. Jackson *v.* Burke, 4 Heisk. (Tenn.) 610. Strict construction: Van Norman *v.* Jackson Circuit Judge, 45 Mich. 204.

[3] In Oregon, if the debtor is about to dispose of his goods to defraud the plaintiff, attachment against them will lie, though no fraud against creditors in general may be designed. Haiglette *v.* Leake, Deady, 469. In Kansas, the assignment of any portion of the debtor's property to defraud creditors is a ground for attachment. Johnson *v.* Laughlin, 7 Kan. 359. Taylor *v.* Myers, 34 Mo. 81.

[4] Hinds *v.* Fagebank, 9 Minn. 68.

about to assign or remove, or intends to assign or remove a *part* of his property.

An assignment by a debtor may be general and illegal yet not be fraudulent so as to be a ground for attachment.[1] But the assignment, transfer or pledging of property under such circumstances as to make the fact evident that the transaction is designed to defraud the plaintiff, and prevent his collection of his demand in the ordinary way, will warrant the charge of fraudulent disposing of property to defeat the result of ordinary process, and will constitute a good ground for attachment.[2] In making such charge, the statute must be implicitly followed, (as, indeed, in all cases,) though all the facts tending to sustain the allegation need not be detailed. Some of the courts are particular in adhering to the letter of the authorization; certainty should be required.[3]

If the transaction by which the debtor disposes of his property by pledge, mortgage, sale, *etc.*, is without consideration, that circumstance will justify the charge of fraudulent disposition, when the plaintiff's rights are thus defeated or put in jeopardy.[4] The charge may be that such disposition was made to defraud creditors, or that it was to defraud the plaintiff.[5] A

[1] Milliken *v.* Dart, 26 Hun. (N. Y.) 24: The invalidity of a general assignment because of provisions authorizing the assignee to compromise, and sell on credit, does not authorize attachment under N. Y. Code, § 636, for disposing of property with intent to defraud.

[2] Weiller *v.* Schreiber, 63 How. (N. Y.) Pr. 491: A purchaser on credit who was to sell again and pay out of the proceeds of sale, pledged the property to third persons, sought to conceal the property, withheld the names of the pledges, *etc.*, for which he was held to have become liable to an attachment suit under § 636 of N. Y. Code, as having "assigned, disposed of, or secreted property."

[3] Craigmiles *v.* Hays, 7 Lea, (Tenn.) 720: Held that charging the defendant with the removal of his live stock from the State is not equivalent to charging "that he has removed, or is removing, himself or his property from the State." Blum *v.* Davis, 56 Tex. 423: Held that the affidavit that defendants were "about to convert their property, or a part thereof, into money, for the purpose of placing it beyond the reach of creditors," was bad because of the alternation.

[4] Taylor *v.* Kuhuke, 26 Kan. 132: A debtor's giving a mortgage, without consideration, to conceal interest in land and defraud creditors, affords ground for attachment by a creditor.

[5] Anerbach *v.* Hitchcock, 28 Minn. 73: A plaintiff may charge that the defendant has disposed of his prop-

simulated sale, to defraud creditors, is good ground for attachment.[1]

The plaintiff's rights are in jeopardy when his debtor is removing property out of the State without leaving enough to pay all the creditors,[2] though enough may be left to pay him. He is in danger of losing the greater part of his claim if it constitutes a minority of the debtor's general liabilities. He cannot rely upon ordinary process as adequate in such case. He is entitled to the conservative writ, especially in States where the first attacher is accorded preference. The reason which supports the attachment ought to prevail everywhere.[3] Certainly the remedy should be accorded, unless in exceptional cases where the removal is evidently but temporary and without ill design.[4] It may be that the permanent removal is not with intent to defraud the plaintiff himself; yet, if there is not enough left in the State to pay all the creditors, it may reasonably be inferred that the removal was designed to defraud some creditor, and that alone would warrant the plaintiff in sueing out his writ of attachment,[5] where the affidavit required by the statute is to the fact that the debtor has removed or is about to remove his property, or a material part of it, out of the State, not leaving enough to satisfy the plaintiff's claim or those of other creditors.[6]

Under such statute, the element of fraud is not an essential

erty in part, and is about to dispose of the rest, to defraud the plaintiff.

[1] Haralson *v.* Newton, 63 Ga. 163.

[2] Mere removal is no ground for attachment: Steele *v.* Dodd, 14 Neb. 496.

[3] Holliday *v.* Cohen, 34 Ark. 707: Removing property from the State without leaving enough to pay debts, is ground for attachment, though enough may be left to pay the attaching creditor's debt; and, to sustain this ground, he may prove other debts. Also: Nutter *v.* Connet, 3 B. Mon. (Ky.) 199.

[4] Warder *v.* Thrilkeld, 52 Iowa, 134: Temporary removal of property from the State, held not to be a ground of attachment under the Iowa code, § 2951, p. 8, authorizing attachment when the debtor is about to remove his property out of the State. Also: Montgomery *v.* Tilley, 1 B. Mon. (Ky.) 155; Friedlander *v.* Pollock, 5 Coldw. (Tenn.) 490.

[5] Sherill *v.* Beach, 37 Ark. 560: Disposal of property to delay or defraud one creditor justifies attachment by another creditor.

[6] Mack *v.* McDaniel, 2 McCrary, C. Ct. 198: In construeing the Arkansas statute, making a ground for attachment that the debtor "is about to remove, or has removed, his property,

ingredient of the debtor's conduct in removing property. Even in due course of business as a merchant, (it has been held) he cannot ship goods out of the State.[1] Doubtless he may ship, when enough remains to pay his debts.[2]

So long as a merchant or any other person has property enough in the State to meet all his obligations, he may have exported all his stock in trade without rendering either that or the remainder liable to attachment. He may even owe as much as the stock is worth, yet that fact will not indicate an intent to remove it, and thus render it attachable, if he has landed estate or other property free from incumbrance and sufficient to render him solvent.[3] Even if he is not solvent, a merchant may sell goods in the ordinary course of his business without being amenable to the charge of fraudulently disposing of them.[4] And such a merchant may buy goods on credit without disclosing his insolvency, yet not necessarily so intend-

or a material part of it, out of the State, not leaving enough to satisfy the plaintiff's claim" or those of other creditors, the court held that a merchant, under such circumstances, could not ship cotton out of the State in the usual course of his business, without becoming liable, though there was no fraud,—the cotton being "a material part of his assets."

[1] Id.

[2] In Alabama, shipping cotton out of the State in the usual course of business, by a debtor who has means enough in the State to pay his debts, will not justify attachment on the ground of removing property, &c. Stewart *v.* Cole, 46 Ala. 646; Clarke *v.* Seaton, 18 B. Mon. 226; Montague *v.* Gaddis, 37 Miss. 453. But it was held in Mack & Co. *v.* McDaniel, 2 McCrary, 198, that sending cotton out of the State, in due course of business, is ground for attachment, if the defendant, (the shipper,) has *not* property enough left in the State to pay his debts.

[3] Wrompelmier *v.* Moses, 59 Tenn. 467. That a debtor is about to remove his stock in trade out of the State is not inferrable from the fact that he owes as much as it is worth, when he has real property within the State of more than twice the amount of his indebtedness, rendering him perfectly solvent. Also: Montague *v.* Gaddis, 37 Miss. 453; White *v.* Wilson, 10 Ill. 21; White *v.* Williams, Id. 25; Ridgeway *v.* Smith, 17 Id. 33.

[4] Hernsheim *v.* Levy, 32 La. Ann. 340: Selling goods in the usual course of business is not a fraudulent disposing of property such as will justify attachment under La. Rev. Code; Art. 240, §§ 4, 5, although the seller may be financially embarrassed. Same principle: Smith *v.* Easton, 54 Md. 138; German Bank *v.* Dash, 60 How. (N. Y.) Pr. 124: Fraudulent disposal of property is not inferrable from the sale of goods by the defendants when authorized by the plaintiffs, (the owners) to sell, and to apply the proceeds to the pay-

ing to defraud his creditor as to warrant the latter in sueing out an attachment.[1]

Whether the transfer of property is in fraud of creditors is always a question dependent upon the *animus* of the debtor and the circumstances of the transaction.[2] Ordinarily it is not necessary that the transferee should be a partieipant in the fraud in order to enable the attaching creditor to inake the requisite affidavit,[3] though there are exceptions.[4] The admissions and declarations of the debtor are to be considered when fraud is a matter of inference from a given state of facts, whether concerning a conveyance of property within the State by deed of sale, or the removal of it beyond the bounds of the State, or any other disposition of the debtor's property; and the sale of it, and subsequent concealment of the money received, under the broad statute ground, "fraudulent disposition of property and effects," may be sufficient to support attachment.[5]

A debtor may be about to assign all his property for the benefit of his creditors without giving occasion for the creditor to attach,[6] unless there are circumstances indicating fraud; and, in the latter case, a threat to assign may support the allegation

ment of bills of exchange which plaintiffs had discounted of the security of the goods, though the defendants used the proceeds, which were more than sufficient to pay the bills, in their business; and attachment would not lie.

[1] Ellison *v.* Bernstein, 60 How. (N. Y.) Pr. 145: The intent to defraud which will justify attachment under N. Y. Code, § 636, subd. 2, must be a logical sequence from facts proved. Buying goods by an insolvent without disclosing his insolvency, and subsequent refusal to secure the seller, were not deemed facts whence such inference could be drrwn.

[2] Curtis *v.* Hoadley, 29 Kan. 566; Clark *v.* Smith, 7 B. Mon. 273: Spencer *v.* Deagle, 34 Mo. 81; Rosenfield *v.* Howard, 15 Barb. 546; McKinney *v.* Farmers' Bank, 104 Ill. 180.

[3] Enders *v.* Richards, 33 Mo. 598.

[4] Johnston *v.* Field, 62 Ind. 377: Fraudulent conveyance, to be sustained as a ground of attachment under 2d. Ind. Rev. Stat. p. 232, § 526, must be such that both the purchaser and the debtor who sold were guilty of fraud. In Leitensdorfer *v.* Webb, 1 New Mex. 34, it was held that an assignment fraudulent in law, though not in fact, was ground for attachment.

[5] Bullene *v.* Smith, 73 Mo. 151; Powell *v.* Matthews, 10 Mo. 49.

[6] Sweet *v.* Reed, 12 R. I. 119; Campbell *v.* Warner, 22 Kan. 604; Wilson *v.* Britton, 6 Abb. Pr. 97; Dickinson *v.* Benham, 10 Id. 390; Eldridge *v.* Phillipson, 58 Miss. 270; Fitzpatrick *v.* Flannegan, 106 U. S. 650; Harris *v.* Capell, 28 Kan. 117.

of being about to make fraudulent disposition of property.[1] Confession of judgment in favor of a third person for the purpose of keeping property out of the reach of a creditor, or fraudulent assignment for that purpose, is sufficient indication to conceal, such as to warrant attachment.[2] The debtor's threats to defeat his creditor by putting property out of the reach of ordinary process; his declarations of intent, and more especially his conduct, may be given in evidence to prove his *animus*. Even the statements of one partner showing fraudulent acts of another member of the firm, may give rise to such inference against himself as to afford ground for attachment.[3]

There are many cases in which attachment is a proper remedy because it will not do to trust to ordinary process, the circumstances being such as to bring the debtor within the statute of the State where the suit is brought against a non-resident, absent, absconding, or property-concealing debtor, yet such as seem to require no special treatment.[4]

The ground, that the cause of action arose in another State

[1] White *v.* Leszynsky, 14 Cal. 165; Newman *v.* Kraim, 34 La. Ann. 910; Gasherie *v.* Apple, 14 Abb. Pr. 64. In Kansas, preference given to certain creditors is no ground for charging fraudulent disposition of property: Campbell *v.* Warner, 22 Kan. 604. Nor is it in any State where making preferences is legal.

[2] Leitensdorfer *v.* Webb, 1 New Mex. 34; Field *v.* Livermore, 17 Mo. 218.

[3] Bryant *v.* Simoneau, 51 Ill. 324: Under the charge that the debtors were removing their property from the State to defraud creditors, the attachment was sustained upon proof that one of the debtors had admitted that his partner had absconded and taken most of the firm's assets with him out of the State, leaving him to pay the debts. The remaining debtor was deemed to have been cognizant of the acts of the absentee, and to have participated in the fraud. Newman *v.* Kraim, 34 La. Ann. 910: Threats to dispose of property, good ground. Fraudulent transfer by one of two insolvent parties justifies attachment upon a joint demand against both: Hircsh *v.* Hutchinson, 64 How. Pr. 366.

[4] Sloan *v.* Bangs, 10 Rich. (S. C.) 15; Dunn *v.* Myers, 3 Yerg. (Tenn.) 414; Stratton *v.* Brigham, 2 Sneed, (Tenn.) 420; McCaulley *v.* Shute, 5 Harrington, (Del.) 26; Sparks *v.* Zebley, Id. 353; Haber *v.* Nasitts, 12 Fla. 589; Bowers *v.* Beck, 2 Nev. 139; Taylor *v.* Knox, 1 Dall. 178; Shipman *v.* Woodbury, 2 Miles, (Pa.) 67; King *v.* Cooper, Id. 176; Kennedy *v.* Baillie, 3 Yeates, (Pa.) 55; Naylor *v.* French, 4 Id. 241; Wilson *v.* Britton, 6 Abb. Pr. 33; Weiller *v.* Schreiber, 11 Abb. N. Cas. 175.

than that in which the suit is brought, and that the debtor has absconded to the latter or secretly removed his goods into it,[1] seems anomalous, since such a state of things may exist and yet ordinary process be as available as in any common suit for debt.

An intent to defraud cannot be inferred from preference given to certain creditors over others in a general assignment, where such preference is not inhibited.[2] The partner of a firm may, under such absence of statutory restriction, prefer his own creditors to those of the partnership. It has generally been thought that any assignment would be void on the ground of fraud which should divert partnership property from the payment of partership debts; prevent the creditors of a firm from making their money out of the assets of the firm.[3] But on the other hand, it seems settled that partners upon the voluntary dissolution of their firm, may transfer, for a valuable consideration, all their joint assets to a single member free from the claims of the partnership joint creditors.[4] When one of two partners dies, the survivor, if no proceeding to liquidate the partnership affairs be pending, may treat the firm assets as his own.[5] Should he then apply them to the payment of his individual debts, it is held that his act will be valid if done in good faith.[6]

Should a creditor of the late firm, assuming that the assets are all bound to the partnership creditors, sue out a writ of

[1] As in Missouri and Tennessee: Merchant *v.* Preston, 1 Lea, (Tenn.) 280: Fraudulent removal of property into the State is ground of attachment by a non-resident against a non-resident. Act of 1870, ch. 122, § 1, amendatory of § 3455 of the Tenn. Code. See Beasley *v.* Parker, 3 Tenn. Ch. 47.

[2] Lord *v.* Devendorf, 54 Wis. 491; Spring *v.* Ins. Co. 8 Wheat, 268; Brashear *v.* West, 7 Pet. 608; Eldridge *v.* Phillipson, 58 Miss. 270; Fitzpatrick *v* Flannagan, 106 U. S. 648; McGinty *v.* Flannagan, Id. 661.

[3] Wilson *v.* Robertson, 21 N. Y. 587; Lester *v.* Abbott, 88 How. Pr. 488; Dunham *v.* Waterman, 17 N. Y. 9; Johnson *v.* McAllister's Assignee, 30 Mo. 327; Rosenberg *v.* Moore, 11 Md. 380; Jenners *v.* Doe, 9 Ind. 464; Johnson *v.* Thweatt, 18 Ala. 744; Forbes *v.* Scannell, 13 Cal. 242; Nye *v.* Van Husan, 6 Mich. 329; Jackson *v.* Cornell, 1 Sandf. ch. 348; Nicholson *v.* Leavitt, 4 Sandf. S. C. 307; Kirby *v.* Scoonmaker, 3 Barb. ch. 46.

[4] Story on Partnership, § 358; Schmidlapp *v.* Currie, 55 Miss. 597.

[5] Locke *v.* Lewis, 124 Mass. 1.

[6] Roach *v.* Brannon, 57 Miss. 490.

attachment and levy upon some of those assets in the hands of a surviving partner, he must proceed on some of the authorized grounds and "bring his case strictly within the letter of the statute," and not rely merely on showing that "the surviving partner is acting in violation of that *quasi* trust imposed upon him by law for the benefit of firm creditors."[1]

The legal right of such creditor, to prosecute his claim to judgment and execution is indisputable. His equitable right to subject partnership assets to the satisfaction of his claim, with preference over creditors of one partner, springs from the right of the other partner to have the firm debts paid out of the joint assets. While the latter "retains an interest in the firm assets, as a partner, a court of equity will allow the creditors of the firm to avail themselves of his equity, and enforce through it the application of those assets primarily to the payment of the debts due them, whenever the property comes under its administration."[2] "If, before the interposition of the court is asked, the property has ceased to belong to the partnership; if by a *bona fida* transfer it has become the several property either of one partner or of a third person, the equities of the partners are extinguished, and consequently the derivative equities of the creditors are at an end."[3]

Sec. 6. Anomalous Grounds.

There are some grounds upon which attachment is authorized, in a few of the States, which are not classifiable with any of the grounds heretofore considered. First, may be mentioned, the fraudulent contracting of the debt sued upon; that is, if the debtor fraudulently contracted it, the creditor may attach.[4] This authorization seems exceptional to the general rule that attachment may be resorted to when ordinary process is not certainly adequate. A debtor who has fraudulently created his debt may yet be susceptible of personal service, and his

[1] Roach *v.* Brannon, 57 Miss. 490.

[2] Case *v.* Beauregard, 99 U. S. 119; re-affirmed, 101 U. S. 688.

[3] Id.; Fitzpatrick *v.* Flannagan, 106 U. S. 648.

[4] As in Col., Kan., Miss., Mich., Md., Minn., Neb., Ohio, Oregon, Ga., Wis., Ill., Mo., Pa., R. I., W. Va., Territories of Wyoming and Washington. And in Iowa in a suit for debt due for property which the defendant obtained under false pretenses.

property may be in no danger of being removed, assigned, secreted or otherwise disposed of to elude final execution. That his should be attachable, while other dishonest men's property is not, appears to be supported by no reason, and is not within the philosophy of conservative remedies. As a statutory ground, standing apart from those above considered, it must be accepted upon authority.

It is often difficult to apply the law to the facts in cases of alleged fraud in the contracting of an obligation to pay.[1]

Another exceptional ground is that the debtor has failed to pay on delivery as per contract. This seems not only without the reason supporting the usual grounds but to be entirely outside of the general attachment theory: The ordinary debtor in danger of losing his claim if prosecuted onlyby the ordinary process should be allowed to create a specific lien so as to conserve the defendant's property in sufficient amount to secure his claim. But the vendor has his lien: why allow him to create another? Why not let him levy upon the goods and vindicate the vendor's lien? This authorization for attachment seems to be nothing more; it is scarcely more within the general subject than the procedure for the enforcement of the mechanic's lien, and the like. *Anomalous Grounds* will be further treated in connection with *Exceptional Attachments*, in the last section of this chapter, after *The Debt* or the usual cause of action shall have been considered.

Sec. 7. The Debt: What Debts are recoverable by Attachment.

The legal creation of a hypothetical lien upon the debtor's attached property to secure an ordinary debt due, and the perfection of that lien by judgment, and the enforcement of it by execution, are purposes of the attachment suit which are

[1] Goss *v.* Boulder Co. Com'rs., 4 Col. 468: Misapplication of funds lawfully received is not the fraudulent contracting of a debt in such sense as will authorize attachment. Marqueze *v.* Southeimer, 59 Miss. 430: Fraudulent contracting. False representations after contracting do not make the debt fraudulently contracted, under Miss. Code, 1880, § 2415. Young *v.* Cooper, 12 Neb. 610. False representations by which the accept-

universal. Debt liquidated or certain, arising upon contract, not protected by any conventional lien or any arising by operation of law, and payable in the State where the suit to collect it is brought, may be secured by the creation and vindication of the attachment lien, (upon the establishment of the prescribed grounds showing that ordinary process would prove inadequate,) in every State of the Union.

If the debt is not due, but is liquidated or certain, and has arisen upon contract, the attachment remedy is not generally applicable though it may be employed under such circumstances in some of the States. That the debt must be payable within the State is not expressed in all the statutes. *Contract* is qualified in some by adding "for the payment of money." Where the suit lies for "breach of contract express or implied," the contract to marry is excepted in several statutes.

Some of the States have fixed a limit to the amount of the debt, so that in a suit for a sum below that limit an attachment will not lie. In others, there is virtual limitation by the confinement of the remedy to courts in which there is no jurisdiction in suits on demands below some specified amount.

The application of this conservative writ has been extended in many of the States to all money demands. It is not confined to debts due upon contract, but is employed in the prosecution of claims for torts. Some statutes expressly authorize it in all actions for the recovery of damages arising *ex delicto* as well as *ex contractu*, where the proper grounds for attachment exist. It is even authorized in suits merely sounding in damages. The pleader must look to the statute under which he proceeds to ascertain whether the remedy is authorized; for there is not

ance and payment of a draft was obtained, held to be a fraudulent contracting of a debt, justifying attachment. Granger's Ins. Co. *v.* Turner, 61 Ga. 561: Attachment is allowed in Georgia in a suit for "money had and received," to recover money paid for stock in a foreign corporation on the ground that it was fraudulently obtained from the plaintiff. Marqueze *v.* Southeimer, 59 Miss. 430: The *animus* of the defendant must be considered, when the fraudulent contracting of the debt is made a ground of attachment. Miss. Code, 1880, § 2415. Wittner *v.* Von Minden, 27 Hun. 269: In an action to recover damages for fraudulently obtaining goods, attachment cannot be issued. See Rosenthal *v.* Wehre, 58 Wis. 621.

uniformity of authorization in cases of tort to such extent as in case of debt upon contract express or implied. The cases are numerous in which courts have held that attachment could not be maintained for torts, offences, *quasi* offences and the like, for want of statute authorization.[1] Obviously, the statute governs in all cases, whether upon contract or tort; but the pleader needs to be more cautious when the latter is the cause of action, since the authorization of attachment therein is less general.

When a statute expressly authorizes attachment for injuries, except for libel, slander, assault and battery, false imprisonment, seduction and breach of promise to marry, (classing the last among the wrongs or offences previously named,) it may be inferred that attachment will lie for any tort not thus excepted. In such cases, the petition must aver a certain sum due, though it is for the jury to assess the damages. There is really no debt certain, but the certainty of the allegation suffices for all the purposes of granting the writ, fixing the amount of the bond, and determining how much property may be lawfully attached.

The injury or wrongful conversion of personal property is such a cause of action as to warrant resort to attachment, in some of the States; and the remedy is employed in one State when the suit is founded on the penal laws.

[1] Piscataqua Bank *v.* Turnley, 1 Miles, 312; Jacoby *v.* Gogell, 5 Serg. & R. 450; Porter *v.* Hildebrand, 14 Pa. St. 129; Thompson *v.* Carper, 11 Humphreys, 542; Fellows *v.* Brown, 38 Miss. 541; McDonald *v.* Forsyth, 13 Miss. 549; Hynson *v.* Taylor, 3 Ark. 552; Baune *v.* Thomassin, 6 Martin, (La.) N. S. 563; Hanna *v.* Loring, 11 Martin, (La.) 276; Prewitt *v.* Carmichael, 2 La. Ann. 943; Greiner *v.* Prendergast, 3 Id. 376; Swager *v.* Pierce, 3 Id. 435; Holmes *v.* Barclay, 4 Id. 63; Marshall *v.* White, 8 Porter, 551: Austin *v.* Grout, 2 Vt. 489; Tarbell *v.* Bradley, 27 Vt. 535; Ferris *v.* Ferris, 25 Vt. 100; Park *v.* Trustees of Williams, 14 Vt. 213; Hutchinson *v.* Lamb, Brayton, (Vt.) 234; Emerson *v.* Paine, 9 Vt. 271; Bradley *v.* Cooper, 6 Vt. 121; Hill *v.* Whitney, 16 Vt. 461; Stanley *v.* Ogden, 2 Root, (Ct.) 259; Maxwell *v.* McBrayer, Phillips, (N. C.) 527; Minza *v.* Zollicoffer, 1 Iredell, (N. C.) 278; Sargeant *v.* Helmbold, Harper, (S. C.) 219; Warwick *v.* Chase, 23 Md. 154; Gordon *v.* Gaffey, 11 Abb. Pr. 1; Shaffer *v.* Mason, 18 Id. 455; Saddlesvene *v.* Arms, 32 How. Pr. 280; Raver *v.* Webster, 3 Iowa, 502; Handy *v.* Brong, 4 Neb. 60; Reed *v.* Beach, 2 Pinney, (Wis.) 26; Elliott *v.* Jackson, 3 Wis. 649; Griswold *v.* Sharpe, 2 Cal. 17. See Pa. Railroad *v.* Peoples, 31 Ohio St. 542.

The several classes of suits in which attachment lies approach much nearer to uniformity in their relation to the auxiliary remedy of attachment, than would appear upon the first, cursory view. Though the phraseology varies in different statutes, the meaning is nearly the same. Under the construction given to the terms *debt*, *debtor*, *creditor*, *claim*, *money-demand*, and others frequently recurring in the several attachment laws, the practice of the different States has been brought more nearly to a general system than would seem possible upon a casual comparison of the statutes. *Debt* has not been confined to its strict technical signification, but made synonymous with any certain obligation for the payment of money. Technically it is the owing of a sum of money by express agreement; but it is understood, in the attachment laws, in its popular sense as the owing of a sum whether the obligation arose upon express agreement or not. It is not generally understood, however, to include obligations arising *ex delicto*; and therefore, when the statute of a State makes no mention of suits for tort when stating what suits may be aided by attachment, but confines them to actions for debt, it must be understood that the legislator has not meant that the writ would lie in suits of the former character.

Decisions in which the above-mentioned terms, "debt," "debtor," "creditor," "money-demand," *etc.*, have been construed, from time to time, have almost invariably given them a popular and liberal rather than a strict construction, so as to render the general practice more uniform than it could otherwise have been, as will appear upon the further consideration of the general subject.

Sec. 8. Exceptional Attachments.

When the principal action is to recover purchase money,—the price of a thing sold and delivered,—and the statute allows the issue of a writ of attachment against the specific property which is the object of the price; and when the suit is for the recovery of specific property ordered by the court to be delivered to the plaintiff, but the delivery of which has been prevented by some wrongful disposition of it by the defendant or some

other person, and the statute authorizes that such property may be attached, such applications of the writ of attachment are exceptional. It would seem that sequestration would be the proper remedy in the latter case. Some of the States, however, enumerate these causes of action among the rest in their attachment laws, and they are treated by the courts accordingly.

In such suits, the petition must describe the specific thing: nothing else can be attached. The pleading must conform to the peculiar circumstances of such cases, which differ widely from ordinary attachment causes, whether on claims arising *ex contractu* or *ex delicto;* especially in this: such exceptional attachments are not for the purpose of creating a lien where none previously existed. The vendor already has the vendor's lien. The owner seeking delivery already has his *jus in re.*

Suits in vindication of any existing lien, such as that of a builder, a mechanic, a laborer under the "log lien laws," may be aided by the attachment of that upon which the lien rests, by the laws of some States, but such *attachment* is exceptional.

Suits in vindication of existing liens are, to some extent, in several States, classed among attachment suits. When the plaintiff is not in possession yet has a right resting upon particular property, and is entitled to proceed by the seizure of that particular property, his action is by attachment; but the proceeding is so different from the usual attachment suit that it may well be treated as exceptional. It is against specific property; it is to vindicate rather than to create a lien; it is governed by different principles from those applicable to other attachment suits, with respect to the affidavit, the bond, the levy, and priority among rival creditors. It should therefore be classified with actions upon mortgage and other liens rather than with ordinary attachment suits. But, as the statutes and the decisions apply the latter term to suits on specific liens authorized by the attachment laws, such proceedings must be noticed herein and treated as exceptional attachments.

In regard to some of these liens, it must be noticed that they are authorized by the attachment statutes; or, rather, the right to proceed finds its warrant in them. In Georgia, property sold

and delivered but not paid for when the debt is due, may be attached by the vendor while it is in the possession of the vendee. The attachment is limited to that particular property, which must be described in the affidavit. Kansas has a similar provision; and in Virginia, attachment lies in a suit to recover specific property. In Kentucky and Arkansas, attachment is authorized in suits to recover personal property, the delivery of which to the plaintiff has been ordered, if it has been so disposed of by the defendant that the sheriff cannot execute the order for delivery. In Nevada, attachment is allowed in all actions upon contract for money payable in the State, with the express exception of those secured by lien or mortgage, and there is like exception in several other States; indeed, that is the general rule. In Rhode Island, if the debtor has owned property or received income, which he has neglected or refused to apply to the payment of his debt after being requested to make such application, attachment is authorized on that ground.

Many other States have provisions for attachment by proceedings differing from the prevalent remedy to create and perfect liens to secure ordinary debts; most of them with reference to builder's and mechanic's liens and others of kindred nature.

In Maine there are various statutory liens, enforceable by attachment, though the object is merely to vindicate the pre-existing right; such as the lien for ship-building materials;[1] for wages;[2] for cut granite, etc.;[3] for manufactured slate, etc..[4]

Suits upon such liens differ essentially from an attachment suit on an ordinary debt to create a lien; yet the courts hold that when such suits have been brought "and the liens cannot be upheld, the attachments may still be considered valid as those of general attaching creditors not seeking to enforce

[1] Fuller *v.* Nickerson, 69 Me. 228; Murphy *v.* Adams, 71 Me. 113: "log lien."

[2] Flood *v.* Randall, 72 Me. 439; Haywood *v.* Cunningham, Id. 128.

[3] Collins Granite Co. *v.* Devereux, 72 Me. 422.

[4] Union Slate Co. *v.* Tilton, 73 Me 207; Stat. 1876, § 90.

liens."[1] It would seem that in States where grounds for attachment must be laid in an affidavit, a suit to enforce a pre-existing lien could not, upon failure to sustain the alleged lien, be converted into an ordinary attachment suit without the previous establishment of some statutory ground, such as non-residence, absconding, or the fraudulent disposition of property.

Other States than that above mentioned have provisions for the enforcement of like liens, and the proceeding is by attachment though quite different from an attachment to create a lien. It seems unnecessary to cite further instances.

Specific liens already existing cannot, as a general rule, be enforced by attachment or garnishment; there is little statutory authorization for such proceeding.[2]

The Michigan lien for labor on logs, etc. is made dependent upon the suit to enforce it when it has been previously recorded or entered as a claim in the office of the clerk of the county in which the labor was rendered. The plaintiff must make an affidavit that his labor and service have been such as to authorize a lien; and if he omits any material allegation which the statute requires, "the officer would have no authority to execute the writ by seizing the property."

There are many provisions in the statute which are peculiar, showing that the attachment is anomalous,[3] though the one just mentioned relative to the omission of statutory requirements is not so. Several other States have "log liens," (as they are popularly styled,) in all of which the proceedings to enforce them are exceptional to the prevalent practice on attachments.

[1] Union Slate Co. *v.* Tilton, 73 Me. 207; First National Bank *v.* Redman, 57 Me. 405; Perkins *v.* Pike, 42 Me. 141; Redington *v.* Frye, 43 Me. 578.

[2] Hodo *v.* Benecke, 11 Mo. App. 6: A boarding-house keeper's lien against guests' wages cannot be thus enforced. Attachment is no remedy for the recovery of specific property: Gates *v.* Bennett, 33 Ark. 475. The Civil Code of Arkansas, authorizes attachment in equity suits: Am. Land Co. *v.* Grady, 33 Ark. 550. Mechanic's lien: Brugman *v.* McGuire, 32 Ark. 733. Lien on crop: Tignor *v.* Bradley, Id. 781; Gnatt's Dig. § § 4101–2.

[3] Woodruff *v.* Ives, 34 Mich. 320.

[4] Howell's Annotated Statutes, § § 8412–8427.

CHAPTER III.

THE INSTITUTION OF THE SUIT.

§ 1. The Petition.
2. The Affidavit—Jurisdictional.
3. " —Matter and Form.
4. " —Indebtedness.
5. " —Grounds.
§ 6. The Affidavit—Amendments.
7. " —As Evidence.
8. The Bond—In General.
9. " —Amount.
10. " —The Obligors.

Sec. 1. The Petition.

Whether the principal action is brought by petition or by some other form of pleading, according to the practice in any State, it is governed by the same general principles: therefore the plaintiff's initial pleading may be treated here as a petition without any tendency to mislead those who are more familiar with the practice in which the suit is upon declaration.

The petition or declaration does not materially differ from its ordinary form because an ancillary proceeding accompanies it. If a suit is brought to recover debt without attachment, it would be precisely like such suit with attachment, except the addition of the allegations necessary to this statutory remedy, and the prayer for the attachment and for privilege on the property in the final judgment. In some States the last named part of the prayer is not required for the perfection of the lien.[1] It would be a work of supererogation, then, to descant at large on the petition; it would be an encroachment upon the general subject of pleading.

The petition, however, has so important a relation to the ancillary attachment proceeding that the latter cannot exist without it or its equivalent.[2] In other words, there must be a principal suit, brought by petition or declaration, in order to institute the ancillary. So far as the petition thus bears upon the attachment proceeding, it should be fully treated.

[1] De Caussey *v.* Baily, 57 Tex. 665: Prayer for attachment held not essential.

[2] Baltimore Bank *v.* Teal, 4 Hughes C. C. 572.

The petition must set forth the nature and amount of the demand;[1] the grounds, (or reference to an accompanying affidavit containing them,) upon which attachment is prayed for; it must allege the fact that affidavit has been made, whether the grounds are stated at length in the petition or not. Where the statute fixes the amount of the bond, (as, for instance, that it shall be in a sum double the amount of what is claimed in the petition,) the plaintiff should refer to it as duly executed and filed or now presented with the petition. Where the practice is to file a declaration without setting forth specifically the amount of the claim, and where the amount of the bond is fixed by the court, the practice is exceptional. The court is sometimes obliged to look to the amount set forth in the affidavit or in the writ in order to fix the amount of the bond. But the practice is pretty general to present to the court a bond, with the petition and affidavit, regulated in its amount by the money demand of the petition. The petition or declaration may be eked out by the attachment papers in some of the States.[2] Where there is serious blunder, such as the misjoinder of defendants, the declaration should be amended, where the practice allows such error to be cured by amendment.[3]

Suit is frequently brought for debt without any design to have it accompanied by an attachment proceeding. The plaintiff, at the time of its institution, may have no reason to fear that ordinary process will not prove adequate. Afterwards—it may be weeks or months afterwards—he may learn that the defendant is taking measures to defeat the execution of any judg-

[1] Bartlett *v.* Ware, 74 Me. 292; Belfast Savings Bank *v.* K. L. & L. Co. 73 Me. 404. In Maryland, the "short note" was held fatally defective for not setting out partners' names: Hirsh Brothers *v.* Thurber, 54 Md. 210. Simpson *v.* Burch, 4 Hun. 315; Seaver *v.* Fitzgerald, 23 Cal. 85; Sueterlee *v.* Sir, 25 Wis. 357; Mackubin *v.* Smith, 5 Min. 367; Harrington *v.* Loomis, 10 Id. 366; Gemmell *v.* Rice, 13 Min. 400; Byrne *v.* Roberts, 31 Iowa, 319; Ogden *v.* Walters, 12 Kans. 282; Dietrich *v.* Lang, 11 Kans. 636; King *v.* Harrington, 14 Mich. 532; Van Wyck *v.* Hardy, 4 Abb. App. Dec. 496; Stienle *v.* Bell, 12 Abb. Pr. N. S. 171; Bixby *v.* Smith, 49 How. Pr. 50. (S. C. 5 Thompson & C. 279.) Dronillard *v.* Whistler, 29 Ind. 552.

[2] As in Georg a: Kolb *v.* Cheney, 63 Ga. 688; King *v.* Thompson, 59 Ga. 380.

[3] Starr *v.* Mayer, 60 Ga. 546.

ment that may be obtained, by removing, secreting or otherwise fraudulently disposing of goods, leaving nothing by which the judgment could be satisfied. The plaintiff may then file a supplemental petition, with affidavit and bond, setting forth statutory grounds for attachment and praying for the writ.

The logical order of pleading requires that the statement of the grounds and the prayer for the writ should precede the filing of the affidavit, or accompany it. In practice, owing to the hurry frequently attending the bringing of attachment proceedings, (as when goods are just about being spirited away,) the order is sometimes reversed—the affidavit being filed and the writ issued before the filing of the petition. No harm can ensue from such practice, if the petition is filed on the same day, or within reasonable time. Courts will not hypercritically note the hours, if both the petition and the affidavit have been filed before the issue of the writ, though the petition come later than the oath. But when a writ was *served* at 3 P. M., and the petition filed at 6 P. M., of the same day, the attachment was held invalid.[1]

They might properly refuse to issue the writ without the prayer for it; but if, in their discretion, and in the confidence which should exist between the court and attorneys practicing before it, the logical order should be reversed for a brief period, the debtor can have no cause to complain. Courts should not grant the writ without a duly filed petition for it, when aware of a pending contest between creditors, if, by granting it, one would thus acquire an undue advantage over another.

Where the question of priority among attaching creditors depends upon the order in which writs are delivered to the sheriff, the filing of the petition, (or of the initial pleading required for the institution of the suit, according to the practice of the State where the suit is brought,) should always precede the issuance of the writ: otherwise, a junior attacher may show that a writ, claiming to be prior to his, was issued without legal authority.[2] Even the first levy will fail to give priority

[1] Seibert *v.* Switzer, 35 Ohio St. 661.

[2] Ward *v.* Howard, 12 Ohio St. 158.

if made before the filing of the petition asking for it, (or before the commencement of the suit in rightful form,) though the affidavit, bond and writ may all be older than the initial pleading of the creditor who has made a later levy in strict compliance with law.[1] Indeed, the auxiliary proceeding depends for its legal existence upon the institution of the principal suit; and, without the latter, there is no authority for issuing a writ of attachment.[2] If issued, the writ is void; and if a non-resident's property be seized under it, there can be no legal notice of publication, and the court would not acquire jurisdiction.[3]

When there is a principal suit, and an attachment in aid of it is separately sued out, the logical order is that the latter should follow the former. It should not precede the principal action, but both may be brought on the same day or even simultaneously; and both ought to be entitled in the same case. They would, however, be so far separate and distinct proceedings that a defense to the ancillary would not necessarily apply to the principal action.[4] Whether instituted separately or not, the principal suit and the attachment proceeding are, in many respects, two different actions;[5] and the latter should not precede the former in the order of institution, for the reason that it is always ancillary in character.[6]

Wherever the plaintiff is required to declare upon an attachment consummated, the practice is exceptional to that above considered.

Though attachment suits are always brought as personal actions, against a personal defendant, and continue to be personal suits when the defendant is summoned or appears in court,

[1] Seibert *v.* Switzer, 35 Ohio St. 661.

[2] Kerr *v.* Mount, 28 N. Y. 659; Waffer *v.* Goble, 53 Barb. 517; Kelley *v.* Strayer, 15 Hun. 97; Pope *v.* Hibernia Ins. Co. 24 Ohio St. 481; Endel *v.* Liebrock, 33 Id. 254; Seibert *v.* Switzer, 35 Id. 661.

[3] Endel *v.* Liebrock, 33 Ohio St. 254.

[4] Schulenberg *v.* Farwell, 84 Ill. 400.

[5] Erwin *v.* Heath, 50 Miss. 795.

[6] Furman *v.* Walter, 13 How. Pr. 348; Marsh *v.* Williams, 63 N. C. 371; Moore *v.* Sheppard, 1 Met. (Ky.) 97; Duncan *v.* Wickliffe, 4 Id. 118; Frankenheimer *v.* Slocum, 24 Ala. 373; Fechheimer *v.* Hays, 11 Ind. 478.

so that the amount of the judgment may be collected from him, even though it exceeds the value of the property attached, yet when he is not brought into court but notified by publication, the suit is really against the property attached and against that only. This has been repeatedly held as elsewhere shown; has been definitely settled by the Supreme Court of the United States, and is consonant with reason and established legal principles.

How is the petition to be understood when property, and not its owner, is that against which the proceeding is directed and the judgment decreed? How are allegations against a person to be applied to his property? How is the prayer for judgment against a person to be read as against the *res* under seizure? How does a petition in a personal action become equivalent to a libel against a thing?

The law supplies the wanting allegations; the law, as construed by the courts, supplies what is necessary to make the pleadings applicable to attached property when the debtor-owner cannot be personally reached. The attachment statutes authorize the ancillary proceeding against the property though the principal suit is personal, and provide that it may be prosecuted to judgment when the defendant in the principal suit cannot be brought into court.

There is no allegation in the petition that the property is an indebted thing, but the law allows the creation of a lien upon it, and authorizes procedure as though there were a pre-existing lien. And it requires notification by publication, so as to enable the uncited owner to appear and claim, as in any action *in rem*. Such publication is not substituted service, since it does not perform the whole office of service so as to render the debtor liable to a personal judgment. It is an invitation to come—not an order for appearance. It is resorted to only when the personal action is seen to be unavailable, and the property action is rendered necessary. Doubtless the legislator might have required that, in such case, the creditor should revise his pleading, and file his suit against the property itself; but, under the construction of the statutes as they stand, the consequent delay and expense are avoided, and the petition is treated as though it

had been originally drawn as a libel against the property attached. It is convenient to have such practice, since the pleadings would yet hold good as those of a personal suit, should the debtor, at a later stage of the cause, render it really such by appearing and defending. Doubtless the practice is anomalous; but it is so well settled that the suit is a personal one only when the defendant appears or is served, (though the form of the pleading on the part of the plaintiff is the same whether there is a personal defendant or not,) that the novelty of such practice cannot be urged against its validity.

The petition, (or other initial pleading,) must disclose such cause of action as may be aided by attachment. Suits to recover debt are those in which the remedy is most generally authorized. Attachment was originally the creditor's remedy, to the exclusion of other classes of litigants; but now it is extended, in many States, to causes between those not bearing towards each other the relation of debtor and creditor, in the technical sense of those terms.

Debts due upon contract give rise to attachments everywhere. Whether the contract be express or implied, the conservative process is generally applicable. The allegation that the debt is due, coupled with some statutory ground for attaching, must be made in the petition. If the debt is not due, the plaintiff is not yet a creditor, and therefore he ordinarily cannot sue; but, the object of attachment being to conserve the property from which the money is to be made in case of judgment, the plaintiff is, in many States, authorized to bring his action on a claim that is certain in amount, while it is yet maturing, before it has become due, if his statutory ground for attachment is that the defendant is fraudulently disposing of himself or his property so as to defeat any judgment that may be obtained. Debt due or not due, under such circumstances, constitutes such a cause of action as to warrant the institution of the suit, though there can be no final judgment till the debt is due.

Attachment would be wanting in utility, in many cases, if the debtor's property could not be conserved so as to await execution, unless in suits for debts due. It is greatly enhanced in

value as a remedy by the authorization for its application in suits on certain obligations not yet matured.

Curiously enough, the ancillary proceeding is essential to the existence of the principal action when the suit is upon a debt not due. Under such circumstances, the latter cannot stand alone.[1] No one can ordinarily sue upon a debt not due. The legislator specially authorizes that such a suit may be brought, accompanied by attachment, when the necessary grounds are laid. The dissolution of the attachment, in such a suit, would work the dismissal of the main action; a result not attending such dissolution in suits upon matured obligations.[2]

Can the attachment proceeding be properly styled "ancillary" in a suit dependent upon it for existence? It is in aid of execution; and, as there can be no judgment upon the demand till the debt has become due and owing, the term seems proper, at least at the termination of the suit. Upon the trial of the main cause, after the maturity of the obligation, the defeat of the plaintiff would dissolve the attachment, as in any other case, though the dissolution of the attachment alone would not then defeat the main action; hence the term "ancillary" is seen to be appropriate.

Whether due or not, the debt must be certain; that is, the petition must be for judgment in some stated amount, under most of the State statutes. As a suit for breach of contract to marry is not upon a money contract; that is, not upon any agreement by the defaulting party to pay any given sum as penalty, the suit is attended with uncertainty as to the amount of damages that ought to be recovered, though the petitioner allege a definite sum in his demand. Hence, some of the statutes, when authorizing attachment in suits for breach of contract, expressly except the contract to marry.

When damages are demanded for debts arising *ex contractu*, and the plaintiff alleges in his petition that a definite amount is due, though there is nothing expressed in the contract itself as to penalty, the action is such as to be susceptible of aid by attachment under provisions of statute authorizing it in suits

[1] Gowan *v.* Hanson, 55 Wis. 341. [2] Id.

for damages, for any money demand, and like causes of action appearing without qualification. Some of the States authorize attachment in suits merely sounding in damages.

A petition may be amended, under leave of court, by supplement or otherwise; but if the object is to render a void attachment valid, the amendment would not have that effect. If, for instance, the petition has been filed under oath, and no other affidavit is made, the amendment might cure the errors of the petition but not those of the affidavit—considering the sworn petition as such.[1] An amendment relates to the commencement of the suit, if the proceeding is founded on a proper cause of action.[2] It should never be permitted when it would work injury to any party in the case—intervenor, defendant or surety. If there has been a departure from the usual practice,—such as failure to attach the affidavit to the petition when that is the legal course,—the cause should not be dismissed nor the attachment dissolved, since it is within the power of the complaining party to require a copy of the omitted paper to be supplied.[3]

The defendant may, of course, take advantage of radical mistakes in the petition, such as a declaration on an "account stated" instead of a declaration "for goods sold and delivered," in States where such particularity is important.[4] An intervenor could not avail himself of such error.[5]

The general rule is: if the declaration is demurrable, the attachment must be quashed.[6] Of course the converse is not true; for an attachment may be dissolvable yet the petition hold good; it may be good pleading in the personal action,

[1] In Marx *v.* Abraham, 53 Tex. 264, the plaintiff had sworn to the petition without any separate affidavit; the petition was insufficient as an affidavit; the petition was amended: held that the amendment cured the defect of the petition, as such, but not its defects as an affidavit. And the court said: "By an unbroken line of decisions from the days of the republic until the present time, an affidavit for attachment cannot be amended." See Brack *v.* McMahan, 61 Id. 1.

[2] Tarkinton *v.* Broussard, 51 Tex. 550; Pearce *v.* Bell, 21 Tex. 690. A new count, as to the debt, would so relate: Mendes *v.* Freiters, 16 Nev. 388.

[3] Olmstead *v.* Rivers, 9 Neb. 234.

[4] Mendes *v.* Freiters, 16 Nev. 388.

[5] Id.

[6] National Bank *v.* Teal, 4 Hughes, 572.

correctly setting forth the indebtedness and properly praying for judgment, yet not alleging statutory grounds for attachment; and there may be no affidavit or no sufficient one.

A plea to the jurisdiction may be sustainable with reference to the ancillary suit yet not to the principal; for though the petition may be good and the defendant may have been served with summons, may have appeared, may have even joined issue in the main case, he may yet set up that the court has no power and authority to hear and determine the ancillary proceeding because the attachment was made without affidavit or without bond, or without such affidavit and bond as the statute requires and that there was therefore no authority to issue the writ under which the attachment was made.

Sec. 2. The Affidavit Jurisdictional.

The affidavit required by statute is essential to the validity of the writ and to the jurisdiction of the court in attachment proceedings. It is required and rendered thus essential, because the creditor has no specific lien upon any particular property of his alleged debtor; and he is not entitled to the extraordinary relief which the statute gives to enforce an ordinary debt, unless he makes the required oath showing the indebtedness to exist, (and that the debt is due, when the statute requires that showing;) and that such statutory grounds exist as are requisite to entitle him to the process of the court. The procedure is anomalous; the remedy is utterly repulsive to the instinct of justice, if ordinary process is adequate and no reason can be shown why there should be seizure before judgment. The remedy is one that might greatly injure the defendant if he is not really indebted as alleged, or is not really putting in jeopardy the right of the creditor to secure his claim in the ordinary way; and therefore the law demands that affidavit of the facts shall be made; and authorizes the court to take jurisdiction to issue the process only when the plaintiff has filed his oath, and also a bond when that too is statutory as it usually is. The statute requirement of an affidavit, or its equivalent in some form of preliminary evidence to support the writ, is universal. The jurisdiction of the court depends upon

the affidavit, (or such equivalent evidence as may be required,) so far as concerns the issuance of the attachment. Unless the jurisdiction exists; unless the plaintiff lays the required foundation, the writ, if issued, and the proceedings following it, would be null and void. If there is no affidavit, or if there is one fatally defective and not amendable, and if there is no waiver by the defendant, all following proceedings under a writ issued without such requisite would be jurisdictionless and void.[1]

There was a case in Michigan which grew out of an attachment suit in a federal court, in which the defendants had been personally cited, so that there unquestionably was jurisdiction over them in the personal action; but, the affidavit being fatally defective because the creditor did not swear that the debt was

[1] Wright *v.* Smith, 66 Ala. 545; Johnson *v.* Hannah, Id. 127; Clark *v.* Garther, 6 Ala. 139; Jones *v.* Pope, Id. 154; Cooper *v.* Trederick, 9 Ala. 738; McGown *v.* Sprague, 23 Id. 524; Kirksey *v.* Fike, 27 Id. 383; Hozeman *v.* Rose, 40 Id. 212; Courrier *v.* Cleghorn, 3 Iowa, 523; Eads *v.* Pitkin, 3 Iowa, 77; Clark *v.* Roberts, 1 Ill. 222; Manly *v.* Headley, 10 Kan. 88; Black *v.* Brisbin, 3 Minn. 360; Beach *v.* Botsford, 1 Doug. (Mich.) 199; Greenvault *v.* Farmer's Bank, 2 Douglass, (Mich.) 498; Wight *v.* Warner, 1 Doug. 384; Wilson *v.* Arnold, 5 Mich. 98; Hale *v.* Chandler, 3 Mich. 531; Buckley *v.* Lowry, 2 Mich. 418; LeRoy *v.* E. Saginaw City Ry. 18 Mich. 233; Watkins *v.* Wallace, 19 Mich. 57, 74; Cadwell *v.* Colgate, 7 Barb. (N. Y.) 253; Vankirk *v.* Wilds, 11 Barb. N. Y. 520; Bates *v.* Relyea, 23 Wend. 336; Earl *v.* Camp, 16 Wend. 562; Morgan *v.* House, 36 How. (N. Y.) Pr. 326; Smith *v.* Luce, 14 Wend. 237; *Ex parte* Haynes, 18 Wend. 611; *Ex parte* Robinson, 21 Wend. 672; *In re* Faulkner, 4 Hill, N. Y. 598; *In re* Bliss, 7 Id. 187; Parker *v.* Walrod, 16 Wend. 514; Smith *v.* Davis, 29 Hun. 306; Foster *v.* Jones, 1 McCord, (S. C.) 116; Devries *v.* Summit, 86 N. C. 126; Biggs *v.* Blue, 5 McLean, 148; Bruce *v.* Cook, 6 Gill & Johnson, (Md.) 345; Shockley *v.* Bulloch, 18 Ga. 283; Graham *v.* DeLannay, 34 Id. 442; Erwin *v.* Commercial Bank, 3 La. Ann. 186; Kerr *v.* Smith, 5 B. Mon. 352; Calk *v.* Chiles, 9 Dana, (Ky.) 265; Worstell *v.* Ward, 1 Bush, 198 Burnam *v.* Romans, 2 Id. 191; Kennedy *v.* Dillon, 1 A. K. Marshall, 354 McReynolds *v.* Neal, 8 Humphreys, (Tenn.) 12; Maples *v.* Tunis, 11 Id. 108; McCulloch *v.* Foster, 4 Yerger, 162; Conrad *v.* McGee, 9 Id. 428; Williams *v.* Glasgow, 1 Nev. 533; Hargadine *v.* Van Horn, 72 Mo. 370; Sanders *v.* Canett, 38 Ala. 51; Greenway *v.* Mead, 26 N. J. L. 303; Merrill *v.* Montgomery, 25 Mich. 73; Bardsley *v.* Hines, 33 Iowa, 157; Schell *v.* Leland, 45 Mo. 289; Estbrook *v.* Estbrook, 64 Barb. 421; Waffle *v.* Goble, 53 Barb. 517; Spiers *v.* Halstead, 71 N. C. 209; Claypole *v.* Houston, 12 Kansas, 324; Riley *v.* Nichols, 1

due, as required by the statute of Michigan—the federal court sitting in that State—there was no authority for issuing the writ to attach property before judgment. The marshal having levied upon property in the lawful possession of third persons holding under chattel mortgage, they sued him in the State court for trespass, and there he offered to prove that the property belonged to the attachment debtor, and sought to shield himself under the writ. Ruled against as to that evidence and failing in that defense, he took the case to the Supreme Court of Michigan where it was held that the statutory requirement of the affidavit was jurisdictional and that the writ was without validity because the debt had not been sworn to be due, and therefore the marshal was a trespasser for levying under it. The court added: "The first step in this jurisdiction is to show not a writ merely but a valid writ; and there can be no valid writ of attachment without a sufficient affidavit. The marshal understood this and endeavored to satisfy the rule by producing a certified copy of the affidavit. Unfortunately the evidence defeated the justification instead of supporting it."[1]

The statute of Michigan on attachment prescribes: "Before any writ of attachment shall be executed, the plaintiff, or some person in his behalf, shall make and annex thereto an affidavit stating that the defendant therein is indebted to the plaintiff and specifying the amount of such indebtedness as nearly as may be over and above all legal set offs, and *that the same is due* upon contract, express or implied or upon judgment, etc."[2]

The clause requiring oath to the maturity of the debt had been construed by the Supreme Court of Michigan before the

Heisk. 16; Bruley *v.* Seaman, 30 Cal. 610; Clark *v.* Roberts, 1 Ill. 222; Redwood *v.* Consequa, 2 Browne, (Pa.) 78; Pancake *v.* Harris, 10 S. & R. 109; Deupree *v.* Eisenach, 9 Ga. 593; Coward *v.* Dillinger, 56 Md. 59; Bowen *v.* Slocum, 17 Wis. 181; Whitney *v.* Brunette, 15 Wis. 61; Marx *v.* Abramson, 53 Tex. 264; Messner *v.* Hutchins, 17 Tex. 597; McNamara, *v.* Ellis, 14 Ind. 516; Mantz *v.* Hendly, 2 Henning & Mumford, (Va.) 308; O'Farrell *v.* Heard, 22 Minn. 189.

[1] Matthews *v.* Densmore, 43 Mich. 461; Reversed, 109 U. S. 216.

[2] Howell's Annotated Statutes, § 7987; the same as in the Compiled Laws, § 6398; though by C. L. § 6433, the affidavit being filed with the clerk need not be attached to the writ; and it was not attached to the writ under discussion in the case of Matthews *v.* Densmore, above cited.

case now under consideration came before them; and it had been held that stating the defendant to be indebted is not equivalent to an allegation that the debt is due;[1] that the debt must be shown to be due;[2] that there must be a present cause of action existing at the time of filing the affidavit;[3] that the affidavit must aver the demand to be due upon contract, etc.,[4] and that the affidavit is necessary to confer jurisdiction.[5]

Sec. 3. The Affidavit—Matter and Form in General.

The state of things at the time the affidavit is made; the indebtedness and the grounds for attachment then existing, must be sworn to; and the oath should be made at the time of the application for the writ.[6] The affidavit is made with reference to property then belonging to the defendant, and then liable to execution as his. It is with reference to no particular property, but to any such property. Herein is a marked difference between attachment proceedings, and proceedings instituted against property already in court under seizure for the adjudication of its *status* as forfeited. In the latter case, the action is against a specific thing; and, though its owner may possess other property, it is not affected by the suit nor the judgment to follow, and it cannot be executed under such judgment.

The attachment affidavit, (except under a statute authorizing the attachment of property, sold and delivered, to recover the purchase money, and other exceptional authorizations, in which the goods or other articles to be seized must be described,) need not contain any description whatever of the property to be attached.

It ought to show that resort to the extraordinary process of attachment is necessary, where the remedy is confined to cases in

[1] Cross *v.* McMaken, 17 Mich. 511.

[2] Wells *v.* Parker, 26 Mich. 102.

[3] Galloway *v.* Holmes, 1 Doug. (Mich.) 350.

[4] Wilson *v.* Arnold, 5 Mich. 98.

[5] Id.; Greenvault *v.* F. & M. Bank, 2 Doug. (Mich.) 498; Beach *v.* Botsford, 1 Id. 199; Hale *v.* Chandler, 3 Mich. 531; Watkins *v.* Wallace, 19 Id. 57, 74; Le Roy *v.* East Saginaw City Railway, 18 Id. 233.

[6] Wilson *v.* Arnold, 5 Mich. 98; Fessenden *v.* Hill, 6 Id. 242; Dorr *v.* Clark, 7 Id. 310; Hubbardston Lumber Co. *v.* Covert, 35 Id. 254.

which the ordinary would not be likely to prove available.[1] It need not show that action has been commenced, or that summons has been issued,[2] unless such showing is expressly required by statute. It need not aver jurisdiction.[3]

To establish the necessity for the extraordinary relief he claims, the creditor must follow the statute when making his oath. If that requires that the debt must be due, he must swear that it is due; if that requires that it must be due on contract, he must swear that it is due upon contract; if that specifies several grounds upon any of which the remedy may be awarded, the affiant must swear to the existence of one or more of the grounds in language substantially embodying the meaning of the statute. The *onus* is on him. The presumption is against the necessity of resorting to the harsh process. His right to move comes solely from the statute, and he must follow it.

The sworn statement of the facts which the law requires is the basis for the issuance of the writ. The creditor, who would have the debtor's property attached, must lay the foundation for the extraordinary proceeding which he prays for, by an affidavit in substantial compliance with the statute upon which he relies as his warrant for the suit, and following the statute form, if any is prescribed.[4]

There is nothing sacramental in the form of the affidavit. Like all papers of that character, it should be clear, succinct, certain, respectful, and as brief as is consistent with a full disclosure of the matter to be expressed. It should show, beyond all ambiguity, in what suit, or intended suit, it is made; should make perfectly clear all necessary facts and the names of the parties. The title of the suit ought to be prefixed, and the

[1] In California, it should show that payment has not been secured by any lien or mortgage: Wilke *v.* Cohn, 54 Cal. 212; Merced Bank *v.* Morton, 58 Cal. 360.

[2] Pickhardt *v.* Antony, 27 Hun. 269.

[3] Branch *v.* Frank, 81 N. C. 180.

[4] Lankin *v.* Douglass, 27 Hun. 517; Richards *v.* Donaughey, 13 Phila. 514; Shockley *v.* Bulloch, 18 Ga. 283, Barrill *v.* Humphreys, 26 Id. 514; McCollem *v.* White, 23 Ind. 43; Moody *v.* Levy, 58 Tex. 532; Reyburn *v.* Brackett, 2 Kan. 227; Matthews *v.* Dare, 20 Md. 248; Emmitt *v.* Yeigh, 12 Ohio St. 335; Hilton *v.* Ross, 9 Neb. 406.

style of the court set forth. Though not in the form of a petition or an address to the judge, it should show in what court it is meant to be filed, and what judge is to act upon it. The filing would cure omissions of the matters last mentioned, but the plaintiff should, as a matter of precaution, (so as to give the clerk no excuse for wrong filing,) make such directions incidentally appear by his affidavit.

A defective affidavit cannot be cured by the averments of the petition. The affidavit is not a part of the pleadings, nor are the pleadings any substitute for the affidavit. A sworn petition may embrace both the character of a petition and of an affidavit. They should be kept separate, however, for various apparent reasons; especially when the practice is against stating the grounds for an attachment in the petition.[1]

The plaintiff, as a pre-requisite to the obtaining of a writ of attachment, must insert in his petition, if that is to take the place of an affidavit or perform its office, that the debt sued for is just, due, or whatever else may be specified by the statute which governs him.[2] If the petition is not sufficient as an affidavit, its subsequent amendment will not avail.

The affidavit must be made by the plaintiff, or his agent, attorney or factor.[3] If the statute requires that it be made by the plaintiff, and gives no express authorization for its being made by an agent, the authority is yet implied, at least under certain circumstances. It must be presumed that the framers of the law meant that a corporation may make the oath by its president or other proper officer, since it is impossible for an artificial person to make an affidavit otherwise than through

[1] Harrison *v.* King, 9 Ohio St. 388.

[2] Endel *v.* Leibrock, 33 Ohio St. 254; Garner *v.* White, 23 Id. 192; Dunlevy *v.* Schwartz, 17 Id. 640. It was held in Louisiana, (where petitions are not sworn to,) that if the absence of the plaintiff is disclosed therein, it need not be shown by the affidavit. Farley *v.* Farior, 6 La. Ann. 725. Indebtedness stated only in the bill: Foster *v.* Hall, 4 Humph. (Tenn.) 346; and that defendant was about to remove property: Lester *v.* Cummings, 8 Humph. 385.

[3] The agent or attorney must swear that he acts for the plaintiff: Miller *v.* C. M. & St. Paul Ry. Co. 58 Wis. 310. If he swear positively to the amount due, he need not state his means of knowledge: Anderson *v.* Wehe, 58 Wis. 615. See Wiley *v.* Aultman, 53 Wis. 560.

some representative. Unless the language of the statute is such as to plainly exclude agents from acting for their principals, it ought to be understood that they may thus act in cases where the principals cannot act personally by reason of absence, sickness or other cause. A foreign corporation should be permitted to make the affidavit by its resident agent. An attorney at law, when authorized by a client who, for any reason, cannot physically appear and make the affidavit himself, should be allowed to represent him.

Where the statute does not confine the making of the oath to the plaintiff himself, there is no reason for invoking the presumption or implication above suggested, but any agent, factor or attorney duly authorized, may thus represent the plaintiff when he cannot personally appear.

The affidavit should be made by the plaintiff himself when he is present; it must, in all cases, be made by one interested in, and responsible for the attachment, or by an agent empowered to represent him; and the legislator is doubtless competent to confine the making of it to the plaintiff himself.[1] It is not usual for statutes to restrict so narrowly except in cases where the plaintiff is personally present. Under such restriction, the spirit of the statute would allow a corporation to make the oath by its president or other authorized officer, since it could not possibly make it in any other way;[2] and, in case the plaintiff is sueing for the use of a third person, it would seem that such person might make the affidavit as the real party-plaintiff.[3]

Affidavits are very frequently made by agents, who swear to their authority as well as to the requisite facts. An agent need not file his power of attorney with his affidavit, though he ought to be ready to exhibit it if required by the officer

[1] Stewart *v.* Clark, 11 La. Ann. 319; Baker *v.* Hunt, 1 Martin, (La.) 194; Cohen *v.* Manco, 28 Ga. 27; Pool *v.* Webster, 3 Met. (Ky.) 278; Mantz *v.* Hendley, 2 Hening & Munford, 308; Myers *v.* Lewis, 1 McMullen, 54; Jackson *v.* Shipman, 28 Ala. 488; Nicolls *v.* Lawrence, 30 Mich. 395.

[2] Faver *v.* Bank of Alabama, 10 Ala. 616; Trenton Banking Co. *v.* Haverstick, 6 Halsted, 171.

[3] Grand Gulf R. R. & Banking Co. *v.* Conger, 17 Miss. 505; Murray *v.* Cone, 8 Porter, 259.

issuing the writ. Under ordinary circumstances, such exhibit is not required, and the officer is not authorized to demand it. He is not bound to issue the writ upon the application of a mere stranger without proof that the applicant is authorized to represent the plaintiff. The authority should be set forth in the affidavit.[1] It must not only appear therein that the affiant is the agent of the plaintiff, but that he is agent for the purpose of making the oath; or has general powers including authorization to do so. And the affiant must swear to such additional circumstances as the statute, under which he appears, may require; such as the absence of his principal, or the inability of his principal to appear for any cause.

If the affiant is an attorney at law, already of record for the plaintiff, having signed and filed the petition in the case, it is not absolutely essential that he should swear to his authority to represent his client when making the affidavit in the latter's behalf. If the statute allows affidavits to be made by attorneys, those at law are included as well as attorneys in fact, and the court must presume their authority when they appear.[2] But as a lawyer may be employed to conduct a cause, yet not to resort to the extraordinary remedy of attachment, it is better that he should disclose his authority to make the affidavit in the instrument itself, and declare under oath why his client does not make it himself. The attorney's authority, as a general rule, is confined to his duties as attorney.[3]

The affiant should sign the affidavit, but his omission to do so would not necessarily be fatal to it.[4] The essential matter

[1] Wiley *v.* Aultman, 53 Wis. 560; Willis *v.* Lyman, 22 Tex. 268; Wetmore *v.* Daffin, 5 La. Ann. 496; Lithgow *v.* Byrne, 17 Id. 8; Pool *v.* Webster, 3 Met. (Ky.) 278; Anderson *v.* Sutton, 2 Duv. (Ky.) 480.

[2] Gilkesen *v.* Knight, 71 Mo. 403; Austin *v.* Latham, 19 La. 88; Clark *v.* Morse, 16 Id. 575; Wetherwax *v.* Paine, 2 Mich. 555.

[3] Alexander *v.* Denaveaux, 53 Cal. 664; and same parties, 59 Cal. 476. See generally, with respect to attorneys' authority to appear for their clients after becoming of record: Steuben Co. Bank *v.* Alberger, 75 N. Y. 179; Ruppert *v.* Haug, 87 Id. 141; Jacobs *v.* Hogan, 85 Id. 243; Trow Printing Co. *v.* Hart, Id. 500; Burton *v.* Wynne, 55 Ga. 615.

[4] West Tennessee Agricultural Association *v.* Madison, 9 Lea. 407; Bates *v.* Robinson, 8 Iowa, 318; Hitsman *v.* Garrard, 16 N. J. Lea. 124;

is that he should make the showing under oath—not that he attest it by his signature. That he made it must appear by the jurat, even though the signature should have been inadvertently omitted.

The signature of the officer to the jurat is not absolutely indispensable, since the fact that the oath was administered may be established by other means, and that is the essential fact.[1] Such omission may be remedied by amendment.[2]

If absence of signature to the jurat may be remedied without fatality, it will be readily seen that the omission of the official designation to the name, or of a part of such designation, is not more serious.[3]

The affidavit may be sworn before any officer authorized to administer oaths.[4] Deputy clerks not only administer oaths, but it is now common for them to issue the writs as well.[5]

When the plaintiff files a petition containing all that should be in an affidavit, and swears to it, he need not file a separate oath of the facts on which he asks that the writ may issue.[6] In such case, the paper filed need not be good as pleading, but it must be good as an affidavit, in order to warrant the granting of the attachment: its quality as pleading may bide its time to be tested. It may be in the form of an affidavit yet contain besides all the essentials of a petition.[7]

Considered as an affidavit, it must contain all the statute essentials of one. If it does not aver the claim to be just and state the amount which the plaintiff believes he ought to recover, the petition, though with the plaintiff's oath appended, will

Redus *v.* Wofford, 4 Smedes & M. 579. Omission to sign held fatal: Watt *v.* Carnes, 4 Heisk. 532; Hargadine *v.* Van Horn, 72 Mo. 370; Cohen *v.* Manco, 28 Ga. 27.

[1] Kruse *v.* Wilson, 79 Ill. 233; English *v.* Wall, 12 Rob. (La.) 132; Simon *v.* Stetter, 25 Kan. 155; Farmers' Bank *v.* Gettinger, 4 W. Va. 305; Cook *v.* Jenkins, 30 Iowa, 452; White *v.* Casey, 25 Tex. 552.

[2] Wiley *v.* Bennett, 9 Bax. 581.

[3] Dyer *v.* Flint, 21 Ill. 80; Singleton *v.* Wofford, 4 Ill. 576; Simon *v.* Shelter, 25 Kan. 155.

[4] Wright *v.* Smith, 66 Ala. 545; Johnson *v.* Hannah, Id. 127.

[5] Minniece *v.* Jeter, 65 Ala. 222; Dorr *v.* Clark, 7 Mich. 310.

[6] Miller *v.* Chandler, 29 La. Ann. 88; Watts *v.* Harding, 5 Tex. 386.

[7] Dunn *v.* Crocker, 22 Ind. 324.

not answer the purpose of an affidavit, where such sworn facts are required as a pre-requisite to attachment.[1]

When the petition or declaration is referred to, in the affidavit, for essential facts, it ought to be attached to, and made part of the affidavit, so that the oath of the affiant may include such facts.[2] A defective declaration may be aided by the attachment papers.[3]

The rule of construction is to insist upon a strict compliance with statutes authorizing attachments.[4] Courts should observe this rule in using their discretionary power, in judging of the sufficiency of affidavits, where discretion is allowed; they should guard against the granting of writs upon loose and imperfect affidavits.[5] Such strictness should not preclude a proper indulgence, within the bounds of their discretion, in considering the sufficiency of affidavits to obtain an attachment. If the affidavit is such as to require the officer to exercise his judgment, he should grant the writ if he believes the law to have been complied with substantially.[6]

The reasons of the rule of strict construction are found in the harshness of the remedy, and the fact that it is out of the ordinary course of practice.[7] For these reasons, and especially because the remedy is statutory, there can be no valid writ of attachment without a sufficient affidavit, as already shown.

[1] Endel *v.* Liebrock, 33 Ohio St. 254.

[2] Crandall *v.* McKaye, 13 N. Y. Sup. Ct. 483: affidavit sustained, though the annexed copy of the complaint was not expressly made a part of the affidavit.

[3] King *v.* Thompson, 59 Ga. 380; Kolb *v.* Cheney, 63 Ga. 688.

[4] Campbell *v.* Hall, McCahon, 53; Parker *v.* Scott, 64 N. C. 118; Van Norman *v.* Jackson Circuit Judge, 45 Mich. 204; Lewis *v.* Kennedy, 3 G. Green, 57; Warner *v.* Everett, 7 B. Mon. 262.

[5] Skiff *v.* Stuart, 39 How. (N. Y.) Pr. 385; Lawrence *v.* Steadman, 49 Ill. 270.

[6] Talcott *v.* Rosenberg, 8 Abb. Pr. N. S. 287: Held that a liberal indulgence may be extended, even upon questions involving jurisdiction; and that if the facts legally tend to support the allegation that the defendant has assigned and disposed of, or is about to assign or dispose of his property with intent to defraud his creditors, it will be sufficient. Also, Booth *v.* Rees, 26 Ill. 45; Jackson *v.* Burke, 4 Heisk. 610: Strict as to the grounds, but liberal as to the application of the remedy.

[7] McDaniel *v.* Gardner, 34 La. Ann. 342; Bussey *v.* Rothschilds, 26 La. Ann. 258; Leonard *v.* Stout, 36 N. J. L. 370.

In the construing of statutes, it is not the rule to treat the language as sacramental, so that it must be embodied *verbatim* in an affidavit in laying the prescribed grounds for an attachment, unless a form is provided.[1] When the plaintiff is required to swear that the debt he sues upon is due upon express or implied contract, equivalent words are usually allowable; as that the claim is due—the defendant is now indebted—the defendant is really obligated upon contract.[2] But when the requirement is that the affiant must swear that he is entitled to recover a stated sum over and above all counter claims known to him, it is not enough to swear that he is "justly entitled to recover said sum;"[3] but a sworn averment that the debt is due "over and above all discounts and set offs" meets the requisition.[4] The cause of action must be shown in the affidavit.[5]

Sec. 4. The Affidavit—Indebtedness.

The principal averments are the indebtedness of the defendant, and the grounds which warrant the remedy by attachment. Both these are absolutely necessary. The first is essential as in all actions for debt upon contract, and not more emphatically so in attachment suits than in other forms of action, except that there must be a preliminary showing of such liability by means of affidavit, and there must be such certainty of statement as the statute, upon which the suit is based, may require in any case.

[1] Parmele *v.* Johnson, 15 La. 429; Sawyer *v.* Arnold, 1 La. Ann. 315; Cross *v.* McMaken, 17 Mich. 511; Ware *v.* Todd, 1 Ala. 199; Graham *v.* Ruff, 8 Id. 171; Wiltse *v.* Stearns, 13 Iowa, 252; Mandel *v.* Peet, 18 Ark. 236; Kennon *v.* Evans, 36 Ga. 89; Boyd *v.* Buckingham, 10 Humphreys, 434; Bank of Alabama *v.* Berry, 2 Humphreys, 443; Commercial Bank *v.* Ulman, 10 Smedes & M. 411; Dandridge *v.* Stevens, 12 Id. 723; Lee *v.* Peters, 1 Id. 503; Wallis *v.* Wallace, 6 How. (Me.) 254.

[2] Trowbridge *v.* Sickler, 42 Wis. 417, (overruling, Whitney *v.* Brunette, 15 Wis. 61 and Bowen *v.* Slocum, 17 Id. 181;) Oliver *v.* Town & Watson, 28 Id. 328; Mairet *v.* Marriner, 34 Id. 582; Ruthe *v.* R. R. Co. 37 Id. 344, (overruling Blackwood *v.* Jones, 27 Wis. 498;) Creasser *v.* Young, 31 Ohio St. 57; Sleet *v.* Williams, 21 Id 82; Ludlow *v.* Ramsay, 11 Wall. 581.

[3] Ruppert *v.* Haug, 87 N. Y. 141.

[4] Lampkin *v.* Douglass, 27 Hun. 517.

[5] Bennett *v.* Edwards, 27 Hun. 242.

The affidavit, in compliance with such statute, must positively swear that the debt is due and just,—that it arises upon contract,—that the obligation is certain though the time of payment has not arrived,—whatever the requirement may be. Where the statement of a contract as the basis of indebtedness is required, it will not do to narrate facts upon which a contract may be inferred, but the plaintiff must swear to the existence of a contract, and the nature and amount of the demand.[1] He need not set forth the contract with the particularity necessary in a declaration, but should state that the alleged indebtedness is founded upon contract. There might be such a narration of facts as would be equivalent to such a statement, precluding any other conclusion, which the court, in the exercise of discretion, could accept.[2]

Where the character of the debt is required to be stated, an omission of such statement is fatal;[3] but there is no need of such particularity in the affidavit where the statute does not require it, and where it is not necessary to enable the court to grant the writ of attachment;[4] for, like other allegations, it may there be inserted only in the petition or declaration.

If the plaintiff fails to make the required averment of the debt in his affidavit, the attachment may be vacated on application of one who acquires interest subsequent to the issue of the writ.[5] And this is so, though the personal suit be unimpeach-

[1] Bartlett *v.* Ware, 74 Me. 272; Belfast Savings Bank *v.* K. L. & L. Co., 73 Me. 404; Quarles *v.* Robinson, 1 Chandler, 29; Hale *v.* Chandler, 3 Mich. 531; Wilson *v.* Arnold, 5 Mich. 98, 104; Russell *v.* Gregory, 62 Ala. 454; Lyon *v.* Blakesly, 19 Hun. 299; Jacoby *v.* Gogell, 5 Serg. & Rawle, 450; Wilmerding *v.* Cunningham, 65 How. Pr. 344; Wallach *v.* Sippilli, Id. 501.

[2] Ruthe *v.* Green Bay & Minn. R. R. Co., 37 Wis. 344; Robinson *v.* Burton, 5 Kan. 293; Klenk *v.* Schwalm, 19 Wis. 111.

[3] Quarles *v.* Robinson, 1 Chandler, 29; *In re* Hollingshead, 6 Wend. 553; Sullivan *v.* Fugate, 1 Heisk. 20; Smith *v.* Luce, 14 Wend. 237; Cox *v.* Waters, 34 Md. 460; Marshall *v.* Alley, 25 Tex. 342; Yarnell *v.* Haddaway, 4 Harrington, (Del.) 437; (See Wright *v.* Hobson, Id. 382.) Rouss *v.* Wright, 14 Neb. 457.

[4] Crawford *v.* Roberts, 8 Or. 324; O'Brien *v.* Daniel, 2 Blackford, 290; Fleming *v.* Burge, 6 Ala. 373; Starke *v.* Marshall, 3 Ala. 44; Bartlett *v.* Ware, 74 Me. 272; Irvin *v.* Howard, 37 Ga. 18; Wilkins *v.* Tourtellott, 28 Kan. 825.

[5] Smith *v.* Davis, 29 Hun. 301, 306.

able in its pleadings, and result in judgment for the plaintiff for the whole debt; for, though the debt be due at the time of the making of the affidavit, no valid writ can be then issued unless the court has the sworn showing that it is due, and therefore no lien can be created on the property attached under a writ issued without the required averment of the debt, in the affidavit. He who acquires interest in, or ownership of attached property, *after* such writ has been issued or even after seizure thereunder, may intervene and have the attachment vacated.

Where the maturity of the defendant's obligation is required to be inserted, an affidavit alleging the indebtedness without averring it to be due, would be defective.[1] There should, in such case, be a positive averment of the sum due, and the action should be confined to it.

Should the indebtedness be stated as exceeding a certain sum mentioned, the statement would be understood as confined to the amount mentioned, and the words averring it to be more would be treated as harmless surplusage.[2] There must be nothing conjectural, merely inferential, in the statement of the indebtedness; declaration upon unliquidated accounts is too indefinite; but strict construction of such statutes as require definite statement of amount is not to be carried to such extremity as to defeat the will of the legislator in providing the remedy of attachment.[3]

When the action is for breach of contract, it is sufficient to show the sum claimed to be due over and above all discounts and set-offs.[4]

The affiant need not set forth every item of the plaintiff's

[1] Mathews *v.* Densmore, 43 Mich. 461, 463; Wells *v.* Parker, 26 Mich. 102; Cross *v.* McMaken, 17 Id. 511; Galloway *v.* Holmes, 1 Doug. (Mich.) 350; Friedlander *v.* Myers, 2 La. Ann. 920; Munroe *v.* Cocke, 2 Cranch. C. C. 465; Lathrop *v.* Snyder, 16 Wis. 293; Levy *v.* Levy, 11 La. 581.

[2] Nelson *v.* Munch, 23 Minn. 229; Flower *v.* Griffith, 12 La. 345; Elam *v.* Barr, 11 La. Ann. 622; Henrie *v.* Sweasey, 5 Blackford, 273; Stewart *v.* Heidenheimer, 55 Tex. 644.

[3] Phelps *v.* Young, 1 Ill. 256; McClanahan *v.* Brack, 46 Miss. 246; Turner *v.* McDaniel, 1 McCord, 552; Holsten Manf. Co. *v.* Lea, 18 Ga. 647; Theirman *v.* Vahle, 32 Ind. 400; Hafley *v.* Patterson, 47 Ala. 271; Gutman *v.* Va. Iron Works Co., 5 W. Va. 22.

[4] Alford *v.* Cobb, 28 Hun. 22, in exposition of Code Civ. Proc. §§ 635, 636.

claim, when only the nature of it is required.[1] He should, under such requirement, state whether the debt is by note, bill or other instrument.[2] He should state the amount of the claim with precision.[3] When an account is annexed to the affidavit, under statute requirement, dates and accounts of different loans constituting the amount should be given, if the claim is of such character.[4] When the amount and the character of the debt is properly stated, it is not generally requisite to particularize all the facts and circumstances out of which the indebtedness arose,[5] though the grounds must be stated with such particularity as to show whether they are the proper subject of an attachment suit.[6]

An affidavit to obtain an attachment to recover purchase money must positively describe the property sold.[7] Such attachment may be issued by an officer who is authorized to issue attachments generally, though the affidavit has been made before an officer of another county.[8] But the affidavit, wherever made, must possess all the legal essentials; and among these is the statement of the price for which the property was sold.[9]

[1] Theirman *v.* Vahle, 32 Ind. 400; Roelofson *v.* Hatch, 3 Mich. 277.

[2] Sullivan *v.* Fugate, 1 Heisk. 20; Pope *v.* Hibernia Ins. Co. 24 Ohio St. 481.

[3] Rupert *v.* Haug, 87 N. Y. 141; S. C. 62 How. (N. Y.) Pr. 364; Pomeroy *v.* Ricketts, 27 Hun. (N. Y.) 242; Barker *v.* Thorn, 20 Mich. 264: Held that the statement of indebtedness, "$3000, as near as can be specified by this deponent," was sufficient under the statute requiring the amount to be specified "as near as may be over and above all legal set-offs." See Pickhardt *v.* Anthony, 27 Hun. (N. Y.) 269. See Mendes *v.* Freiters, 16 Nev. 388: Overclaim not fatal. Grover *v.* Buck, 34 Mich. 519.

[4] Cox *v.* Waters, 34 Md. 460: Held, under the Md. Code.

[5] Weaver *v.* Hayward, 41 Cal. 117; Ellison *v.* Tallon, 2 Neb. 14. But in Tenn., the fact that steamboat materials were furnished within that State must be alleged in the petition, in order to sustain an attachment to recover a debt for the materials: Emory Iron and Coal Co. *v.* Wood, 6 Heisk. 198.

[6] Richter *v.* Wise, 3 Hun. 398; Ruthe *v.* Green Bay & Minn. R. R. Co., 37 Wis. 344; Kiefer *v.* Webster, 13 N. Y. Sup. Ct. 526; Lyon *v.* Blakesley, 19 Hun. 299. In Oregon, the ultimate, not the probative facts are required: Crawford *v.* Roberts, 8 Or. 324. In Mich., the claim must be sworn to be due: Mathews *v.* Densmore, 43 Mich. 461.

[7] Bruce *v.* Conyers, 54 Ga. 678: relative to personal property. Waxelbaum *v.* Paschal, 64 Ga. 275.

[8] Wicker *v.* Scofield, 59 Ga. 210.

[9] Camp *v.* Cahn, 53 Ga. 558.

This species of attachment is exceptional, and therefore the affidavit is peculiar. It is analogous to attachmment to enforce specific liens, such as are authorized in several of the States, since it has reference only to the property described in the affidavit. There may be no pre-existing lien, but the law authorizes the creation of a hypothetical lien on the thing sold to the amount of the price, upon the creditor's compliance with the statutory requirements. Such an attachment bears a different relation to other, competing attachments to secure ordinary debts, than would one of their own species. The vendor, under the law, looks to the identical thing which he has sold, in his effort to recover the purchase money; and, if he has the vendor's lien upon it, that would not be displaced by an ordinary attachment though the latter should be prior in the order of date.

Sec. 5. The Affidavit—Grounds.

The grounds for the writ can be no other than those authorized by the statute upon which the plaintiff proceeds.[1] He must swear to one or more in his affidavit. One good ground is sufficient.[2] He must bring himself strictly within the authorization for the extraordinary remedy which he invokes. However artistically he may have set forth the indebtedness, it will avail him nothing if he should fail to show that the defendant is a non-resident, or has absconded, or is about to abscond, or is secreting his property or himself to avoid legal proceedings, or some other ground specified in the statute. And the statement of such fact must be plain and unequivocal, such as would subject him to all the consequences of any wrong done thereby in case the statements should prove false.

The laying of the grounds must be substantially according to statute, though not necessarily in the employment of the

[1] Matter of Fitch, 2 Wendell, 298; Tallman *v.* Bigelow, 10 Id. 420; Ex parte Haynes, 18 Id. 611; Smith *v.* Luce, 14 Id. 237; Matter of Brown, 21 Id. 316; Ex parte Robinson, Id. 672; Matter of Faulkner, 4 Hill (N. Y.) 598; Matter of Bliss, 7 Id. 187; Pierse *v.* Smith, 1 Minn. 82; Morrison *v.* Lovejoy, 6 Id. 183.

[2] Lawver *v.* Langhans, 85 Ill. 138; Keith *v.* Stetter, 25 Kan. 155; McCollem *v.* White, 23 Ind. 43.

same verbiage.[1] Any nicety that would defeat the purpose of the law would be too fine. While courts have no power to issue the writ except what is conferred by statute, yet they must use their judgment in determining whether the statute has been complied with by the plaintiff in making his preliminary showing, and whether a slight deviation from the requirements of the statute is, in any case, sufficient to vitiate the affidavit and render it insecure as the foundation of an attachment suit. Law has been defined, "A solemn expression of legislative will;" and if the will of the legislature can be seen, through a statute, and the plaintiff, in making an affidavit, has virtually and substantially complied with that will, the court should sustain the affidavit.

On the other hand, the rights of the defendant are to be protected. He is not to be held as defendant under an attachment suit in the absence of a substantial compliance with the law, on the part of the plaintiff. Fatally defective affidavits are to be treated as powerless in their efforts to move the court to the exercise of jurisdiction. There is to be no guessing at the meaning. There is to be no constructural emendation of allegations positively bad. There is to be no supplementing of the oath, to make it cover the requirements of the statute, by an over-liberal rendering on the part of the court. Where the affidavit is fatally insufficient, and no application to amend

[1] Parker *v.* Scott, 64 N. C. 118; Leonard *v.* Stout, 36 N. J. L. 370; Curtis *v.* Settle, 7 Mo. 452; Campbell *v.* Hall, McCahon, 53; Talcott *v.* Rosenberg, 8 Abb. Pr. N. S. 289; Chambers *v.* Sloan, 19 Ga. 84; Kennon *v.* Evans, 36 Ga. 89; Van Kirk *v.* Wilds, 11 Barb. 520; Cross *v.* McMaken, 17 Mich. 511; Skiff *v.* Stuart, 39 How. (N. Y.) Pr. 385; Graham *v.* Ruff, 8 Ala. 171; Ware *v.* Todd, 1 Ala. 199; Bank of Ala. *v.* Berry, 2 Humphreys, 443; Boyd *v.* Burkingham, 10 Humphreys, 434; Runyan *v.* Morgan, 7 Humphreys, 210; Sawyer *v.* Arnold, 1 La. Ann. 315; Parmele *v.* Johnston, 15 La. 429; Lee *v.* Peters, 1 Smedes & M. 503; Commercial Bank *v.* Ullman, 10 Smedes & M. 411; Dandridge *v.* Stevens, 12 Smedes & M. 723; Bussey *v.* Rothschilds, 26 La. Ann. 258; Wallis *v.* Wallace, 6 How, (Mi.) 254; Earl *v.* Camp, 16 Wend. 562; Parker *v.* Walrod, Id. 514; Wiltse *v.* Stearns, 13 Iowa, 282; Beach *v.* Botsford, 1 Doug. (Mich.) 199; Leroy *v.* East Saginaw Ry. 18 Mich. 233; Watkins *v.* Wallace, 19 Mich. 57, 74; Mandel *v.* Peet, 18 Ark. 236; Sellick *v.* Twesdall, Dudley, (Ga.) 196; Levy *v.* Millman, 7 Ga. 167; Phelps *v.* Young, 1 Ill. 256; Hilton *v.* Ross, 9 Neb. 406.

is made, and no amendment is actually effected, application for the issuance of a writ of attachment should be denied.[1]

There may be such a statement of fraud and intent to defraud made against the debtor, on account of his disposition of his property to defeat the claims of creditors, as would be sufficient for the arrest of the debtor, and yet the allegations may be inadequate to authorize a writ of attachment because of the absence of some necessary averment.[2] On the other hand, without setting out specific acts of fraud, general statements in accordance with the statute requirements will warrant the issuance of the writ.[3]

To swear merely that the debtor has left the State without adding that he left with the intention of removing his goods from the State; (or that he is concealing himself, without adding "to avoid process;") when the latter is required to be stated, is insufficient.[4] Setting forth such facts in an intelligible way without using statute phraseology, will answer the demands of the law;[5] but general averments, not connecting the plaintiff with the fraudulent acts charged so as to show that he is interested in his application for the attachment, would be entirely too vague. For instance, to aver merely that the debtor is

[1] Campbell *v.* Hall, McCahon, 53; Drew *v.* Dequindre, 2 Doug. 93; Weimeister *v.* Manville, 44 Mich. 408; Poage *v.* Poage, 3 Dana, 579; Skiff *v.* Stuart, 39 How. (N. Y.) Pr. 385; Napper *v.* Noland, 9 Porter, 218; Claussen *v.* Fultz, 13 S. C. 476; Bennett *v.* Avant, 2 Sneed, 152; Wright *v.* Smith, 66 Ala. 545; Davis *v.* Edwards, Hardin, 342; Hamilton *v.* Knight, 1 Blackford, 25; Powers *v.* Hurst, 3 Blackford, 229; Devries *v.* Summit, 86 N. C. 126; Mantz *v.* Hendley, 2 Hening & Munford, 308; Manly *v.* Headley, 10 Kan. 88; Wallis *v* Murphy, 2 Stewart, 15; Hargadine *v.* Van Horn, 72 Mo. 370; Lane *v.* Fellows, 1 Mo. 251; Alexander *v.* Haden, 2 Mo. 187; Millaudon *v.* Foucher, 8 La. 582; New Orleans *v.* Garland, 11 La. Ann 438; Reding *v.* Ridge, 14 La. Ann. 36; McCulloch *v.* Foster, 4 Yerger, 162; Wharton *v.* Conger, 9 Smedes & M. 510; Croxall *v.* Hutchings, 7 Halsted, 84; Weimeister *v.* Manville, 44 Mich. 408; Messner *v.* Hutchins, 17 Tex. 597; Levy *v.* Millman, 7 Ga. 167; Brown *v.* McCluskey, 26 Ga. 577; Allen *v.* Fleming, 14 Rich. 196; Winkler *v.* Barthel, 6 Ill. App. 111.

[2] Achelis *v.* Kalman, 60 How. (N. Y.) Pr. 491; Claussen *v.* Fultz, 13 S. C. 476; Cobb *v.* Force, 6 Ala. 468.

[3] Auerbach *v.* Hitchcock, 28 Minn. 73; Sharpless *v.* Zeigler, 92 Pa. St. 467; Stevens *v.* Middleton, 26 Hun. 470.

[4] Crayne *v.* Wells, 2 Ill. App. 574; Winkler *v.* Barthel, 6 Ill. App. 111.

[5] VanLoon *v.* Lyons, 61 N. Y. 22; Free *v.* Hukill, 44 Ala. 197.

about to transfer his property for the purpose of defrauding his creditors, yet to omit stating that the plaintiff would lose his debt unless allowed the remedy sought, or equivalent words, was held erroneous, and the affidavit declared defective.[1]

Reasonable latitude must be given to the phraseology of the sworn statement. Where oath "to the best of the knowledge and belief," of the affiant, is required, it will suffice to swear to information received of defendant and believed by deponent.[2] But it would not be enough to swear "to the best of his knowledge" only, or "to the best of his belief" only.[3]

If a partnership firm are plaintiffs, it is the knowledge and belief of the members of the firm which should be sworn to, but the affidavit would hold, as a sufficient compliance with the law, if the knowledge and belief of the firm be the subject of the oath.[4]

Where the plaintiff is required to make a showing of certain circumstances, to satisfy the court that he is entitled to the issuance of the writ, his oath that he believes those facts is no proof of them. Considering the fallibillity of human judgment, and the partiality which a litigant usually feels toward himself, the court is obliged to receive, with much allowance, the honest statements of an affiant as to "information received," and what he "verily believes," if the law makes the issuance of the writ depend upon preliminary proof of circumstances. Indeed, the plaintiff's belief is not a circumstance to be taken at all into the account, under such requirement.[5]

One swearing upon information received, must state the absence of his informant, where the statute requires it; and a

[1] Sheffield *v.* Gay, 32 Tex. 225.

[2] Blake *v.* Bernhard, 6 Thompson & C. (N. Y.) 74; Howell *v.* Kingsbury, 15 Wis. 272.

[3] Garner *v.* White, 23 Ohio St. 192; Bergh *v.* Jayne, 7 Martin, N. S. 98; McHaney *v.* Cawthorn, 4. Heisk. 508. Swearing to belief has been held sufficient in New York: *Ex parte* Haynes, 18 Wend. 611. Matter of Fitch, 2 Wend. 298. See Smith *v.* Luce, 14 Wend. 237.

[4] Stewart *v.* Katz, 30 Md. 334.

[5] Hellman *v.* Fowler, 24 Ark. 235; Williams *v.* Martin, 1 Met. (Ky.) 42; Dunlevy *v.* Schartz, 17 Ohio St. 640; Sydnor *v.* Tolman, 6 Tex. 189; Pierse *v.* Smith, 1 Minn. 82; Morrison *v.* Lovejoy, 6 Minn. 183; Murphy *v.* Purdy, 13 Id. 422; Tallman *v.* Bigelow, 10 Wend. 420; *Ex parte* Robinson, 21 Wend. 672; Matter of Faulkner, 4 Hill, 598; Kingsland *v.* Cowman, 5 Hill, 608; Matter of Bliss, 7

neglect of such statute provision will render the affidavit insufficient.[1] There is a difference between believing and having reason to believe; and where the State requires oath to the latter, it is not a compliance to confine the oath to the former.[2] Distinction is made between material and less important allegations, with regard to positive knowledge of them; and the former cannot be received merely upon oath of information and belief, where positiveness is required;[3] nor upon apprehension and belief.[4] Distinction is made between swearing that affiant *thinks* and swearing that he *believes;*[5] but such differentiation seems too fine when only opinion is the subject of the oath.

Material allegations, even charging fraud as a ground, may be upon information and belief, if ancillary facts, tending to sustain the material averments, be positively averred in the affidavit.[6] Positively sworn averments are often nothing more than reasonable belief attested under oath.[7]

The indebtedness is a material averment to be alleged positively.[8] If on belief, the source of information should be stated.[9]

To charge absconding as a ground for attachment, it is not enough to aver that the defendant is in another State and is

Hill, 187; Dewey *v.* Green, 4 Den. (N. Y.) 93; Camp *v.* Tibbets, 2 E. D. Smith, (N. Y.) 520; Hill *v* Bond, 22 How. (N. Y.) Pr. 272; Brewer *v.* Tucker, 13 Abb. (N. Y.) Pr. 76.

[1] Steuben Co. Bank *v.* Alberger, 78 N. Y. 252. In Ala. the attorney of a non-resident client swore that he was informed and believed and therefore stated that the defendant, who was a non-resident, was justly indebted, etc., and the affidavit was held good: Mitchell *v.* Pitts, 61 Ala. 219. Under similar circumstances, held bad in Georgia: Neal *v.* Gordon, 60 Ga. 112.

[2] Hunt *v.* Strew, 39 Mich. 368.

[3] Claflin *v.* Baere, 57 How. (N. Y.) Pr. 78; Greene *v.* Tripp, 11 R. I. 424; Archer *v.* Claflin, 31 Ill. 306; Dyer *v.* Flint, 21 Ill. 80.

[4] Brown *v.* Crenshaw, 5 Bax. 584. In N. C. indebtedness and departure from the State being sworn positively, "intent to avoid summons" was sworn on information and belief, and held sufficient: Hess *v.* Bower, 76 N. C. 428.

[5] Rittenhouse *v.* Harman, 7 W. Va. 380.

[6] As, that the facts sworn on information had been stated to the defendant and that he had admitted their truth: Blake *v.* Bernhard, 6 Thompson & C. (N. Y.) 74; 3 Hun. 397.

[7] Simpkins *v.* Malatt, 9 Ind. 543.

[8] Manton *v.* Poole, 67 Barb. 330; Black *v.* Scanlon, 48 Ga. 12.

[9] Bennett *v.* Edwards, 27 Hun. 352.

about to dispose of his property.[1] Non-residence, though a material fact when it is the ground of attachment, may be a matter of inference from the facts stated, if it is the only inference that can logically be drawn from the facts.[2] It could not be inferred that the defendant is a non-resident or an absconding debtor from the vague averment that he has left the State; certainly it could not be inferred to the exclusion of every other hypothesis.[3] Nor could it be concluded, under such averment, that his leaving was with intent to defraud his creditors.[4]

Inference, to the exclusion of all other hypotheses, is not required, but rather the most probable inference from the facts, in matters where the statute need not be followed literally.[5]

Hearsay is not necessarily excluded in making the showing, upon oath, of circumstances required to justify the issuing of the writ. What has been said by members of a runaway debtor's family may be mentioned as contributory to the conclusion that he has absconded; or that he has left the State permanently; or that he has concealed goods. The court must be satisfied that there is good ground for the attachment under the statute, though the proof fall short of what would be necessary to sustain a judgment for the plaintiff upon the trial. Or, if the clerk is to have discretion and be satisfied upon evidence before issuing the writ, the rule is the same: for the clerk is the right hand of the court, and the writ is issued through him rather than by him.

Whatever the circumstances adduced, the affiant must swear to his belief of their truth. This requirement is a safeguard to prevent the officer from being trifled with, and to check the plaintiff from trying doubtful experiments.

The oath of attorneys is usually to knowledge and belief.[6] They may not have personal knowledge, such as would enable

[1] State *v.* Morris, 50 Iowa, 203.

[2] Mayor, &c., of N. Y. *v.* Genet, 4 Hun. 487; Graham *v.* Ruff, 8 Ala. 171; McKiernan *v.* Massingill, 14 Miss. 375; James *v.* Dowell, 15 Id. 333.

[3] Mutherrin *v.* Hill, 5 Heisk. 58.

[4] Love *v.* Young, 69 N C. 65.

[5] Talcott *v.* Rozenberg, 3 Daly, 203, (8 Abb. Pr. N. S. 287); Cooney *v.* Whitfield, 41 How. Pr. 6; Ware *v.* Todd, 1 Ala. 199.

[6] Mitchell *v.* Pitts, 61 Ala. 219; White *v.* Stanley, 29 Ohio St. 423; Howell *v.* Kingsbury, 15 Wis. 272.

them to substantiate all the required facts in the capacity of witnesses, but they may have received credible information, such as has really induced belief; and that is sufficient showing for the issuance of the writ, to be followed by the pleadings and the testing of the truth of such information received. No one can be hurt, since the plaintiff's bond stands behind the affidavit to secure the defendant against any wrong.

Where agents are allowed to make the oath, if the statute requires that the plaintiff's knowledge and belief be sworn to, the agent must swear to his principal's knowledge and conviction and not to his own.[1] But his personal information may be better than that of his principal, and he may swear to it as such when there is no statutory impediment.[2] He is acting for his principal in making the preliminary showing to take out the process.

Obviously, when he comes to sustain the attachment contradictorily with the defendant, he is a competent witness to prove facts—not mere belief.

It will be understood that, as an affidavit is not pleading, no artistic form of oath to his authority is required by the affiant when he is an agent. His statement of the fact anywhere in the body of the affidavit will suffice; but "J. K. on behalf of J. S. being duly sworn" was held not sufficient.[3]

The necessary thing is certainty, in the compliance with requirements. Nothing ambiguous, in essential points, will be sufficient. The plaintiff must positively state his grounds, whether absolute knowledge is required, or an absolute statement of the fact of his knowledge and belief, so as to preclude a second suit for the same demand.[4] One of the reasons why the grounds cannot be set forth equivocally in the affidavit is found in the harsh character of the remedy invoked. Because attachment is an extraordinary proceeding, permissible only in consideration of the danger the plaintiff fears in his attempt to

[1] Stewart *v.* Katz, 30 Md. 334; Dean *v.* Oppenheimer, 25 Md. 368; Murray *v.* Hankin, 65 How. Pr. 511.

[2] Rausch *v.* Moore, 48 Iowa, 611.

[3] Miller *v.* C. M. & St. Paul Ry. Co. 58 Wis. 310; Wetherwax *v.* Paine, 2 Mich. 555.

[4] Bond *v.* Patterson, 1 Blackf. (Ind.) 34.

collect his dues, the law granting him the writ to seize before judgment should be strictly construed, and all liability of oppressing the alleged debtor should be carefully avoided. If the defendant is a non-resident, or an absconding debtor, or one who is fraudulently disposing of his property, an affiant alleging him to be any one of these must make the allegation with certainty.

If the requirement is that the plaintiff must state the character or nature of his claim, he may do so in brief and ordinary language, without the particularity necessary to pleading, provided the characterization conveys the idea without equivocation.[1] There is no better rule than that of following a statute *verbatim*, (if there is no reason why that cannot be done,) in setting forth the grounds of attachment in an affidavit.

Often it occurs that a conscientious affiant must qualify his statement by some explanation. He may rightly do so, if he does not impair the certainty of the required oath.[2] It would not do to say that the defendant is indebted in a sum approximating to a thousand dollars,[3] but it would be sufficient to state the debt as exceeding a thousand dollars.[4] In the latter case, the oath will be deemed certain in its averment to the amount of a thousand dollars, while in the former it is wholly indefinite.

Conscientious explanations should be respected and graciously received and considered by the court, since they may give greater assurance of the truth of the affidavit than a formal fol-

[1] Holstein Manuf. Co. *v.* Lea, 18 Ga. 647; Force *v.* Hubbard, 26 Id. 289; Theirman *v.* Vahle, 32 Ind. 400.

[2] Lampkin *v.* Douglass, 27 Hun. 517. Though the statute required the plaintiff to swear that he was not indebted to the defendant "in any wise or upon any account whatever," the court held an affidavit good in which the plaintiff admitted his indebtedness, in "some small amount," contracted since the note sued upon was given. Turner *v.* McDaniel, 1 McCord, 552. An affidavit was sustained, though the plaintiff, after stating a positive sum as the debt due him, qualified it by admitting that it might be subject to set-off. Holston Manuf. Co. *v.* Lea, 18 Ga. 647. However, if the statute requires that the statement of the debt must be that it is over and above any set-off, the qualification just mentioned would be fatal.

[3] Lathrop *v.* Snyder, 16 Wis. 293.

[4] Nelson *v.* Munich, 23 Minn. 229; Flower *v.* Griffith, 12 La. 345.

lowing of the statute words would give. It is better that the plaintiff lose his application than that he should succeed by a positive averment which, in conscience, he ought not to have made without qualification.

An affidavit that the debtor has assigned his property and is about to assign it, was held not necessarily inconsistent;[1] that he has disposed of part of his property and is about to dispose of the rest, to defraud the plaintiffs, was held a consistent and sufficient averment;[2] but the statement that the defendant has "hastily removed his live stock to another State for the purpose of hindering and delaying the plaintiff in the collection of his debt," was not deemed such an averment as would justify attachment.[3] The allegation that the debtor has made a pretended or simulated sale to avoid creditors, is sufficient ground.[4] An averment that the debtor has disposed of property to defraud *any* of his creditors, is sufficient, where the statutory provision provides in general terms, that attachment may issue, if the debtor has "assigned, disposed of, concealed, etc., any of his property to defraud his creditors."[5]

The requirement of certainty, however, does not altogether exclude alternate allegations. While it would be uncertain, should the statement be that the debtor is either a non-resident or is a resident now absent from the State; that he is an absconding debtor or is concealing his property to avoid execution, it would not be uncertain to state that the debt sued upon is one of contract express or implied, where the statute requires oath that the sum due is upon contract express or implied; for the purpose of the legislator was to confine attachments to suits upon contract, and such affidavit is a sufficient compliance with the law, though there is alternation.[6] In a petition or declara-

[1] Nelson *v.* Munch, 23 Minn. 229; *Contra:* Kegel *v.* Schrenkheisen, 37 Mich. 174. See Hills *v.* Moore, 40 Mich. 210.

[2] Auerbach *v.* Hitchcock, 28 Minn. 73.

[3] Craigmiles *v.* Hays, 7 B. J. Lea, 720.

[4] Haralson *v.* Newton, 63 Ga. 163.

[5] Howell's Annotated Statutes of Michigan, § 7987; Allen *v.* Kinyon, 41 Mich. 281.

[6] Klenk *v.* Schwalm, 19 Wis. 111; Hawley *v.* Delmas, 4 Cal. 195; Hopkins *v.* Nichols, 22 Tex. 206; White *v.* Lynch, 26 Tex. 195. See Garner *v.* Burleson, Id. 348, and Culbertson *v.* Cabeen, 29 Id. 247.

tion, the contract must be stated without such alternation; but the niceties of pleading are not essential to an affidavit. Yet even in pleading, in civil cases, facts may sometimes be stated in the alternative if either is sufficient to establish a proposition. Even in libels for the forfeiture of property, stating a charge in the alternative may hold good if either alternative constitutes a ground for which the thing libelled may be forfeited.[1] The particularity of criminal indictments is not deemed essential. The reasoning is that the requirement of the law is met, whichever of the alternatives may be true, provided both are good allegations. The same reasoning may be applied to some requirements of the attachment laws, respecting affidavits, though inapplicable to others. If a statute limits attachments to suits upon contract express or implied, the affidavit may state the debt to be upon an express contract; it may state it to be upon an implied contract; it may state it to be upon an express *or* implied contract. But it would not do to say that the debt is in the sum of one hundred or one thousand dollars; that the defendant is a non-resident or an absconding debtor; that he is concealing himself or his property to avoid creditors, etc. Thus, even if both of such allegations be good grounds,—either capable of standing alone, it has been held that they cannot be coupled disjunctively without impairing the legality of the affidavit.[2] Whenever two grounds are thus disjoined, and one of them is bad, the affidavit cannot be acted upon;[3] but it is not fully settled that two good grounds

[1] The Emily and Caroline, 9 Wheat. 381; The Caroline, 7 Cr. 500, *note;* U. S. *v.* The Little Charles, 1 Brock. 348; The Merino, 9 Wheat. 391; The Samuel, 1 Wheat. 14; Jacob *v.* U. S. 1 Brock. 520; Parsons on Shipping and Admiralty, Vol. 2, p. 383.

[2] Kegel *v.* Schrenkheisen, 37 Mich. 175; Blum *v.* Davis, 56 Tex. 426; Carpenter *v.* Pridgen, 40 Tex. 32; Guile *v.* McNanny, 14 Minn. 520; Stacy *v.* Stichton, 9 Iowa, 399; Devall *v.* Taylor, Cheves, 5; Wray *v.* Gilmore, 1 Miles, 75; Shipp *v.* Davis, Hardin, 65; Hopkins *v.* Nichols, 22 Tex. 206; Garner *v.* Burleson, 26 Tex. 348; Culbertson *v.* Cabeen, 29 Tex. 247; Allen *v.* Fleming, 14 Rich. (S. C.) 196; Hawley *v.* Delmas, 4 Cal. 195; Wilke *v.* Cohn, 54 Cal. 21; Ronaldson *v.* Hamilton, 5 La. Ann. 203; Elam *v.* Barr, 11 La. Ann. 622; Hickman *v.* Flenoriken, 12 Id. 268; Rogers *v.* Ellis, 1 Handy, 48; Jewel *v.* Howe, 3 Watts, (Pa.) 144.

[3] Davis *v.* Edwards, Hardin, 342; Hagood *v.* Hunter, 1 McCord, 511; Barnard *v.* Sebre, 2 A. K. Marshall, 151; Dunnenbaum *v.* Scram, 59 Tex. 281.

may not be legally coupled by the disjunctive *or* in an affidavit; indeed, the affirmative has been judicially maintained.[1]

There can be little doubt that the use of the disjunctive is allowable in affidavits, if the statute uses it in such a sense as to express but one ground. For instance, if the grounds are numbered in the statute, and, under one number is placed the ground, *If the debtor absconds or conceals himself:* may not the affiant swear that his debtor has absconded or is concealing himself? It is, under some circumstances, the only honest form of oath that the plaintiff can take with regard to his debtor's disappearance. When the leading idea of a statute ground for attachment is the avoidance of process by absconding, the means of avoidance may be sworn to in the alternative; so may incidental facts respecting other leading grounds.[2]

Inconsistent grounds, when copulatively joined, are liable to the same objection to which they would be exposed if expressed alternately; such as the statements that the debtor has disposed of certain property to defraud creditors, and that he is about to dispose of the same property for that purpose, since it is not possible that both assertions can be true.[3]

Nothing in the affidavit more positively requires unequivocal statement than the amount of the indebtedness sued upon; yet when a plaintiff had sworn that the defendants "are or will be justly indebted," he was allowed to amend by striking out the words "or will be."[4] Without such emendation, the sworn

[1] Irvin *v.* Howard, 37 Ga. 18; Howard *v.* Oppenheimer, 25 Md. 350; Dean *v.* Oppenheimer, Id. 368; Smith *v.* Foster, 3 Coldw. (Tenn.) 139; Goss *v.* Gowing, 5 Rich. (S. C.) 477. *Contra:* Haygood *v.* Hunter, 1 McCord, (S. C.) 511; Wood *v.* Wells, 2 Bush, 197; Blum *v.* Davis, 56 Tex. 423; Hardy *v.* Trabue, 4 Bush, 644; Klenk *v.* Schwalm, 19 Wis. 111.

[2] Parsons *v.* Stockbridge, 42 Ind. 121; Stokes *v.* Potter, 10 R. I. 576; Van Alstyne *v.* Erwine, 1 Kernan, 331; McCraw *v.* Welch, 2 Col. T. 284; Klenk *v.* Schwalm, 19 Wis. 111; Brown *v.* Hawkins, 65 N. C. 645; Johnson *v.* Hale, 3 Stewart & Porter, 331; Cannon *v.* Logan, 5 Porter, (Ala.) 77; Commercial Bank *v.* Ullman, 10 S. & M. 411; Boothe *v.* Estes, 16 Ark. 104; Bosbyshell *v.* Emanuel, 12 S. & M. 63; Wells *v.* St. Dizier, 9 La. Ann. 119; Conrad *v.* McGee, 9 Yerger, 428; Goss *v.* Gowing, 5 Richardson, 477; Hopkins *v.* Nichols, 22 Tex. 206.

[3] Hinds *v.* Fagebank, 9 Minn. 68; Kegel *v.* Schrenkheisen, 37 Mich. 174.

[4] Tommey *v.* Gamble, 66 Ala. 469.

allegation of indebtedness would doubtless have been fatally defective by reason of the alternation which coupled a good cause of action with one totally irrelevant. One cannot be sued because he will become indebted, even in States where there is no necessity of averring that the debt is due in order to conserve property to satisfy it eventually; and where the maturity of the debt is an essential averment, no valid writ can be issued without such allegation in the affidavit. To aver that defendants "are or will be indebted," is not to aver that they now are so; and, if not amended, the affidavit would be fatally defective.

Sec. 6. The Affidavit—Amendments.

An affidavit may follow the statute, contain all that is required, and be sufficient for the purposes of a judgment and the maintaining of the court's jurisdiction, and yet be such that it ought to be rejected. Not on grounds connected especially with the attachment laws, but on the general ground that all papers presented to the court should be of a proper character. Such an affidavit, though containing all required allegations, may be disrespectful, frivolous, unseemly; it may be ridiculously prolix, tediously circumstantial, or otherwise objectionable, so that the court may direct its modification; and, upon the plaintiff's refusal to change it, the court, in the exercise of its right to maintain order and discipline, may decline to allow it to be filed.

The superfluous words of a statute may be safely omitted in making the affidavit. Swearing that the defendant is indebted is equivalent to swearing that he is "justly indebted," except where the statutes prescribe the quoted words. All that it is necessary to express is the meaning of the statute. Words that would seem redundant in the statute may be of evident importance in an affidavit. The courts will judge of their necessity; and it is better to retain all the adjectives and adverbs of the statutory requirement. However, they are often non-essentials.[1]

[1] Oliver *v.* Town & Watson, 28 Wis. 328; Mairet *v.* Marriner, 34 Wis. 582; Trowbridge *v.* Sickler, 42 Wis. 417; Creasser *v.* Young, 31 Ohio St. 57; Drake *v.* Hager, 10 Iowa, 556; Livengood *v.* Shaw, 10 Mo. 272; Ken-

In drawing an affidavit, one had better say too much than too little, since mere surplusage, when not inconsistent with required averments, will not invalidate them.[1] Mere clerical mistakes, such as the omission of a word easily supplied in making sense of the context, (such as the word "is," when omitted, being part of the verb "is indebted,") do not invalidate the affidavit.[2] So, the substitution of one word for another will not be fatal to the instrument, if the sense can be readily ascertained;[3] such as the word "goods" for "property."[4]

There is no necessity for such nicety of expression as is required in old forms of pleading. If defendants are averred, in the plural, to be non-residents, the affiant may omit to add, "nor is either of them a resident," etc.[5] If the statute requires oath that the claim is just, equivalent words will answer;[6] so, if it requires the plaintiff to swear that he believes he ought to recover, he may swear that the debt is due.[7]

The omission of averments positively required by the statute will not invalidate the affidavit, if the requirement of such averments is unconstitutional.[8]

It is always safe to omit what is presumed in the absence of assertion, such as the fact that the defendant is an adult.[9] Redundancy is not a fatal defect. One part of the instrument may correct another. A slight error in the affiant's name, in the recital, is cured by his signature.[10] If his name is not stated in the body of the affidavit, the fault is not serious.

nedy *v.* Morrison, 31 Tex. 207; Hughes *v.* Martin, 1 Ark. 386; Hughes *v.* Stinnett, 9 Ark. 211.

[1] Curtis *v.* Moore, 3 Minn. 29; McMahon *v.* Boardman, 29 Tex. 170; Nelson *v.* Munch, 23 Minn. 229; Pitkins *v.* Boyd, 4 Greene, (Ia.) 255; Commercial Bank *v.* Ullman, 18 Miss. 411; Lee *v.* Peters, 9 Miss. 503; Tommey *v.* Gamble, 66 Ala. 469.

[2] Buchanan *v.* Stirling, 63 Ga. 227.

[3] Levy *v.* Elliott, 14 Nev. 435; McClanahan *v.* Brack, 46 Miss. 246; Buchanan *v.* Sterling, 63 Ga. 227; Levy *v.* Elliott, 14 Nev. 435.

[4] Hafley *v.* Patterson, 47 Ala. 271.

[5] Franklin *v.* Claflin, 49 Md. 24.

[6] Ludlow *v.* Ramsey, 11 Wall. 581; Gutman *v.* Va. Iron Co. 5 W. Va. 22.

[7] Sleet *v.* Williams, 21 Ohio St. 82.

[8] Ross *v.* Jenkins, 7 W. Va. 284; Lynch *v.* Hoffman, Id. 553, 578.

[9] Wentzler *v.* Ross, 59 How. Pr. 397.

[10] Kahn *v.* Herman, 3 Ga. 266; Hunter *v.* Peaks, 74 Me. 363.

The essential matter is that the affidavit, as a whole, shall show that it was made by the party whose oath it purports to be, so as to render him responsible for the sworn statement. He certainly cannot become entitled to the benefit of the affidavit if it shows anything less.

It has been held that the omission of the name of one of the plaintiffs, in the petition, is supplied by the signature to the affidavit and bond, when the plaintiffs constitute a firm and the signature is that of the firm name.[1]

The omission of the affiant's signature is a serious, though not everywhere held to be a fatal defect.[2] It is not like the omission to state the grounds of the action, for it does not affect the jurisdiction, while failure to aver the grounds is fatal and irremediable because it does affect the jurisdiction[3] and cannot be remedied after the issue of the writ.[4] The general rule is that whatever is statutorily required to the validity of the attachment cannot be omitted without fatality. The venue is necessary to prove the administration of the oath, and it should not be omitted;[5] but it has been held that the omission may be supplied.[6]

Slight variance between the petition and the affidavit may sometimes be explained by comparing the one with the other, when the discrepancy does not amount to a substantial defect. Even if the amount of the claim is slightly understated in the affidavit, the error will not prove fatal when the writ follows

[1] Barriere *v.* McBean, 12 La. Ann. 493. In Foran *v.* Johnson, 58 Md. 145, it was held that the mistake of inserting "James & Co." instead of the firm name, "James Foran & Co.," in the affidavit, was not fatal, since other parts of the instrument rendered the meaning certain.

[2] In Missouri, the error is fatal, and the court has no jurisdiction of the attachment suit under such an affidavit, and a deed to a purchaser at a sale under a judgment in such case is void. Hargadine *v.* Van Horn, 72 Mo. 370. *Contra:* Bates *v.* Robinson, 8 Iowa, 318; Hitsman *v.* Garrard, 16 N. J. L. 124.

[3] Zeregal *v.* Benoist, 33 How. Pr. 129. See many citations in chapter on jurisdiction.

[4] Wright *v.* Smith, 66 Ala. 545; Johnson *v.* Hannah, Id. 127. But see Day *v.* Bennett, 18 N. J. L. 287; Shaddock *v.* Marsh, 21 Id. 434, and Irwin *v.* Howard, 37 Ga. 18, respecting the amendability of such defect.

[5] Rudolph *v.* McDonald, 6 Neb. 163. See McCartney *v.* Branch Bank, 3 Ala. 709.

[6] Wiley *v.* Bennett, 9 Bax. 581.

the affidavit and not the petition averring a greater sum to be due.[1]

When an affidavit is fatally defective, the court should disregard it; but, in case the court should ill-advisedly issue the writ, the best course for the plaintiff to pursue is to abandon it and begin his proceedings anew. No valid judgment can be based upon such false foundation; no jurisdiction can be acquired.

Defects in the affidavit are of two kinds: those which affect the jurisdiction and those of a minor character. The former may be urged to impeach a judgment collaterally, while the latter can be taken advantage of in the case only, during its progress before the court of the first instance or on appeal. Where a statute requires the plaintiff to swear to the ground upon which the attachment is issued, and he fails so to swear, the defect is jurisdictional; but where the requirement is "that certain facts shall appear by affidavit to the satisfaction of the court or judge" before an order for publication notice to a non-resident debtor can be issued, "defects in such affidavit can only be taken advantage of on appeal, or by some other direct proceeding, and cannot be urged to impeach the judgment collaterally."[2] That is, defects not jurisdictional; for though the court is to be the judge of what is proof to its satisfaction, it cannot acquire jurisdiction by accepting an affidavit omitting an essential fact—for instance, the debtor's non-residence, when that is the ground; or his absconding, when the plaintiff proceeds upon that; nor can the oath to the indebtedness be omitted.

Where amendment of the affidavit is allowable, the plaintiff should not fail to amend as soon as he discovers his mistake; and this should be before the issuance of the writ. Amendment is not universally allowable after the writ has been issued —some of the States permitting it while others do not. Even after a motion to quash the proceedings on the ground of defect in the affidavit, the plaintiff is allowed to amend, under certain

[1] Stewart *v.* Heidenheimer, 55 Tex. 644.

[2] Pennoyer *v.* Neff, 95 U. S. 721.

statute provisions,[1] and time is given him for the purpose. Material allegations cannot be supplied upon leave granted to amend as to form. The general rule is that defects of form are amendable: defects of substance incurable.[2]

Should an attachment be dissolved because the affidavit is defective, the plaintiff may begin anew, as a matter of course; but to dissolve the attachment and grant leave to amend the affidavit, is generally erroneous (though it has been permitted,[3]) and the error may avail the defendant upon appeal.

If the affidavit is utterly void and worthless, the defendant may have a valid judgment ultimately rendered against him, if he litigates without objecting to it; but the judgment would be as if in an ordinary suit.[4]

Grounds stated in an amended affidavit, made after the issuance of the writ, must not be those first existing at the time of the amending of the affidavit, but those that existed at the time of the issuing of the writ; for, if the court acted without jurisdiction, for want of essential facts, no new state of facts would cure the error.[5]

Any rights acquired by third persons, between the time of the issuance of a writ upon a defective affidavit, and that of the amendment of the affidavit, would be unaffected by the amendment. In other words, though such tardy statement of the true grounds of procedure, may be made available to the plaintiff against the defendant, they cannot reach the intervening rights and interests of others.[6] Sureties on a bond for the dissolution of an attachment, are not bound

[1] Fitzpatrick *v.* Flannagan, 106 U. S. 650; Bunn *v.* Pritchard, 6 Iowa, 56; Magoon *v.* Gillett, 54 Iowa, 54; Atkins *v.* Womeldorf, 53 Iowa, 153; Rogers *v.* Cooper, 33 Ark. 401; Struthers *v.* McDowell, 5 Neb. 491.

[2] Flexner & Lichter *v.* Dickerson, 65 Ala. 129. A mistake in the direction of an affidavit, being not one of substance, is amendable: Warren *v.* Purtell, 63 Ga. 428.

[3] Nolen *v.* Royston, 30 Ark. 561; Graves *v.* Cole, 1 G. Greene, 405.

[4] Hills *v.* Moore, 40 Mich. 210.

[5] Lillard *v.* Carter, 7 Heisk. 604; Robinson *v.* Burton, 5 Kan. 293; Hall *v.* Brazelton, 46 Ala. 359; Crouch *v.* Crouch, 9 Iowa, 269; Marx *v.* Abramson, 53 Tex. 264; Wadsworth *v.* Cheeny, 10 Iowa, 257; Sherrill *v.* Bench, 37 Ark. 560; Deories *v.* Summit, 86 N. C. 126.

[6] Patterson *v.* Gulnare, 2 Dis. 505; Whitney *v.* Brunette, 15 Wis. 61; Bell *v.* Hall, 2 Duvall, 288.

for an increase of the plaintiff's claim made by amendment after the bonding;[1] but such sureties are not discharged by the plaintiff's amendment of a count so as to state it more accurately.[2]

If there should be such a change in one count of the declaration as to relieve the sureties from liability thereunder, they would yet remain bound for the sums claimed under the other counts not amended nor affected.[3]

A motion for leave to amend the affidavit comes too late after a motion to vacate the attachment, as a general rule of practice.[4] The practice varies in different States. In some, amendments to attachment affidavits are inhibited.[5] In others they are allowed with varying degrees of liberality.[6]

Landlords, on attachments for rent, have been allowed to amend their affidavits after the issuance of the writ.[7] And even after a motion to quash, amendment has been permitted that the officer who took the affidavit might insert the venue.[8] And amendment by inserting grounds existing when the affidavit was first made, have even been permitted after appeal,[9] though the general practice is otherwise.[10]

The rule is imperative in some States, and, indeed, it is pretty general, that fatal defects cannot be amended after the

[1] Prince *v.* Clark, 127 Mass. 599; Hill. *v.* Hunnewell, 1 Pick. 192; Willis *v.* Crooker, Id. 204; Wood *v.* Denny, 7 Gray, 540; Freeman *v.* Creech, 112 Mass. 180.

[2] Cutter *v.* Richardson, 125 Mass. 72.

[3] Warren *v.* Lord, 131 Mass. 560; Knight *v.* Dorr, 19 Pick. 48; Seeley *v.* Brown, 14 Pick. 177.

[4] Trow's Printing & Bookbinding Co. *v.* Hart, 60 How. (N. Y.) Pr. 190.

[5] Marx *v.* Abramson, 53 Tex. 264.

[6] Sherrill *v.* Bench, 37 Ark. 560; Tommey *v.* Gamble, 66 Ala. 174; Halley *v.* Jackson, 48 Md. 254; Allen *v.* Brown, 4 Met. (Ky.) 342; Worthington *v.* Carey, 1 Id. 470; Staggers *v.* Washington, 56 Ala. 225; Lillard *v.* Carter, 7 Heisk. 604.

[7] Rogers *v.* Cooper, 33 Ark. 406. In Ala. the affidavit in an attachment for rent is not amendable if it omits to allege that the removal of the crops, (if that is the ground,) was without the landlord's consent: Shield *v.* Dothard, 59 Ala. 595. Amendment has been allowed the landlord even after the quashing of his attachment because of the omission of a necessary averment. Nolen *v.* Royston, 36 Ark. 561.

[8] Struthers *v.* McDowell, 5 Neb. 491.

[9] Sherrill *v.* Bench, 37 Ark. 560.

[10] Adams *v.* Merritt, 10 Ill. App. 275.

attachment has been issued.[1] Even where amendments are allowable, they will not be permitted to the injury of other attaching creditors.[2]

Some errors or omissions in the affidavit may be cured by the petition filed simultaneously with it, or nearly at the same time. If the full names of persons composing a partnership are set forth in the petition or declaration, that sufficiently explains the affidavit where only the firm name is stated.[3]

So far as the defendant is concerned, if he is present in court, and a motion by the plaintiff to amend an attachment is heard contradictorily, he has not the same reason to complain of an amendment as a competing attaching creditor would have.[4]

Many defects of affidavit are cured by the defendant's general appearance,[5] but not the omission of statutory requisites. His appearance does not give the court jurisdiction of the ancillary action where there is such omission.

When there are two attachment suits against a defendant who has a dormant partner, the partnership assets in the name of the defendant are attachable. One of the attachers would gain no advantage over the other by amending his pleading so as to include the dormant partner, nor would he lose his priority by the useless and harmless amendment.[6] No notice of such amendment need be given to the rival attacher, since it does not affect his interest or the question of priority.[7]

[1] The rule well expressed in Lillard *v.* Carter, 7 Heisk. 604; Hall *v.* Brazelton, 46 Ala. 359. But there are exceptions to the rule, as in N. C.: Brown *v.* Hawkins, 65 N. C. 645.

[2] Patterson *v.* Gulnare, 2 Disney, 505.

[3] Clayburg *v.* Ford, 3 Ill. App. 542. *See* Barber *v.* Smith, 41 Mich. 138, with reference to names and nominal mistakes.

[4] In Fitzpatrick *v.* Flannegan, 106 U. S. 650, it was held that where amendments to defective affidavits are authorized, they may be made after the levy; even after the defendant has filed a plea in abatement to the grounds upon which the writ was issued and the levy made, the plaintiff may amend and set forth new grounds, if the defendant is not taken by surprise, nor prejudiced, nor put to any disadvantage thereby.

[5] Brayton *v.* Freese, 1 Ind. 121.

[6] Wright *v.* Herrick, 125 Mass. 154; Lord *v.* Baldwin, 6 Pick. 348; French *v.* Chase, 6 Greenl. 166.

[7] Tucker *v.* White, 5 Allen, 322.

The property of a debtor is not attachable because of the fraud of his absconding partner.[1]

Sec. 7. The Affidavit—as Evidence.

Where it is made the duty of the court to issue the writ upon the sworn statement of the necessary statutory facts, no further preliminary showing can be exacted of the plaintiff. The writ issues as a matter of course. Clerks of courts issue it for the courts, where authorized by law to do so.

But where the requisite facts must be proved to the satisfaction of the court, the affidavit of the plaintiff may not be deemed sufficient. The court may not be satisfied, and may require further proof. What the court must have proved, (though by evidence *ex parte*,) is some good ground for the issuing of the writ, beyond the statement of indebtedness. Suppose the ground laid by plaintiff should be that the defendant is about to abscond. An oath that the plaintiff believes that the defendant is about to abscond would be no establishment of the fact that the defendant is about to abscond. But, should there be evidence showing circumstances that are convincing to the judge, he may be satisfied that the debtor is about to runaway and may grant the writ. When he must first be satisfied, not only of the absconding or intent to abscond, but that the object of the debtor is to defraud creditors, such additional facts must be reasonably shown by affidavits or other *ex parte* evidence. In other words, statute requirements must be met, whatever they are.[2]

Where no traverse of the facts stated in the affidavit is allowed, great strictness is required of the plaintiff in compliance with the law governing the issue of an attachment upon his oath or upon other evidence.[3] Where it is allowed, more

[1] Bogart *v.* Dart, 25 Hun. 395: But see Mills *v.* Brown, 2 Met. (Ky.) 404; Duncan *v.* Headley, 4 Bush. 45.

[2] Pierce *v.* Smith, 1 Minn. 82; Keigher *v.* McCormick, 11 Minn. 545; *Ex parte* Haynes, 18 Wend. 611; Miller *v.* Brinkerhoff, 4 Den. 118; *Ex parte* Robinson, 21 Wend. 672; *In Re* Faulkner, 4 Hill, (N. Y.) 598; Matter of Bliss, 7 Id. 187.

[3] Formerly this was the case in Wis., and the reasons apply wherever traverse is not permitted. Lorrain *v.* Higgins, 2 Pin. (Wis.) 454; Quarles

liberality is shown towards the plaintiff in granting him the writ, since there is a summary remedy, by rule or otherwise, in case the attachment should turn out to have been improvidently granted.[1]

Where traverse is allowable it should be before final judgment in the case, if at all.[2] It should be on the trial or before: the summary testing of the plaintiff's affidavit usually is before the trial of the main issue or issues. Certainly the traverse should never be after final judgment in a cause, when the grounds of attachment have been passed upon; and for two reasons: first, there can be no such tardy traverse without statutory authorization; secondly, there is no reason, upon legal principle, for testing the issue of the attachment after the hypothetical attachment lien has been merged in a judgment-lien.[3]

Though the plaintiff may have legally procured his writ upon swearing to his belief of a fact, the question, when the defendant comes to traverse the affidavit, is not what the plaintiff believed when he made oath, but whether the facts were really true which he swore that he believed to be true.[4] The grounds for attachment laid down in any statute, are not the beliefs of facts but facts themselves; and, though a writ may issue under many of the statutes upon oath to belief, it can never be consummated without proof of the necessary facts. And wherever the debtor may legally draw the grounds of attachment into question by traverse, in some form, before the trial of the cause, those grounds cannot be maintained merely by proof of the plaintiff's belief in their existence.[5]

It is to avoid delay in the issuing of the attachment that the practice pretty generally allows the granting of the writ upon

v. Robinson, Id. 97; Merrill *v.* Law, 1 Id. 221; Morrison *v.* Ream, Id. 244; Slaughter *v.* Bevans, Id. 348.

[1] Davidson *v.* Hackett, 49 Wis. 186.

[2] Bassett *v.* Hughes, 48 Wis. 23.

[3] In Wis. held irregular to try the action while traverse is pending. Main *v.* Bell, 33 Wis. 544; Davidson *v.* Hackett, 45 Wis. 208.

[4] Davidson *v.* Hackett, 49 Wis. 186; Cohen *v.* Burr, 6 Wis. 200; Cooper *v.* Smith, 8 Wis. 358. The above cases were decided upon construction of Wisconsin statutes.

[5] Davidson *v.* Hackett, 49 Wis. 186; Noonan *v.* Pomeroy, 14 Wis. 568; Rice *v.* Jerenson, 54 Wis. 248.

an *ex parte* showing of mere belief; but belief is not a ground for sustaining attachment, under any statute.

When, on a motion to discharge an attachment, affidavits are admissible in support of the motion, they are also admissible as counter evidence; that is, counter affidavits may be offered against the motion.[1]

An important thing—an absolutely essential thing concerning the affidavit is that it must be filed and made part of the record in the attachment suit. It is the preliminary step to the lien, and it should be so marked or endorsed by the clerk that it may be identified with the proceedings to follow. The filing should take place without delay, that the plaintiff may have the benefit of his earlier action in case of competing creditors coming after him to obtain attachments.

Whether the affidavit should be filed on the day of the issuance of the writ, or may be filed before without affecting the validity of the proceeding thereon, depends upon statute provisions. If the oath required with respect to non-residence is that the defendant has been absent for three months immediately preceeding the making of the affidavit or the making of the application for attachment, the affidavit should be filed on the day the writ is issued;[2] but the practice is pretty general to allow the time to go unquestioned, if within a day or two before the issuing of the writ, where the reason above stated is inapplicable.[3]

The foregoing remarks upon the affidavit are not wholly applicable to it when attachment is employed in suits to recover personal property, the delivery of which to the plaintiff has been ordered, if such disposition has been made of it by the defendant that the sheriff cannot execute the order of delivery. Sequestration is the remedy employed in some other states to effect the same purpose. In every State there is a remedy pro-

[1] Baer *v.* Otto, 34 Ohio St. 11.

[2] In exposition of the Michigan statute: Drew *v.* Dequindre, 2 Doug. 93; Wilson *v.* Arnold, 5 Mich. 98; Fessenden *v.* Hill, 6 Mich. 242; Dorr *v.* Clark, 7 Id. 310.

[3] Wright *v.* Ragland, 18 Tex. 289. Creagh *v.* Delane, 1 Nott & McCord, 189; Wirker *v.* Scofield, 59 Ga. 210.

vided, though it does not everywhere take the name of attachment, nor find its authorization in the attachment statutes.

The term, attachment, is used in several lien laws; in those authorizing procedure in vindication of builders' and mechanics' liens, etc.; in statutes authorizing seizures by landlords for rent; but in all of these, attachments are in vindication of specific liens, and the suits are directed against specific property and are governed by principles applicable to them, though so different from those governing ordinary attachments that the suits must be treated as exceptional with respect to the affidavit.

In suits upon specific liens, it is not required that the plaintiffs should show that the defendants are non-residents, or absconders or concealers of property, or that ordinary process would prove unavailing. Such suits, though called attachment proceedings, are like those instituted to enforce mortgage liens, in which the essential allegations of the plaintiff are that the debt is owing and that it is secured by mortgage—not that the defendant is absent, absconded or non-resident. Such attachment suits are, in this respect, directly the opposite of those usually so designated and may therefore well be styled exceptional. In the affidavit required, in some States, the fact that the debt is not secured by mortgage or any specific lien must be averred, in ordinary attachment suits, while in the exceptional ones now under consideration, the existence of the lien is essential.

Another marked difference is that in the ordinary attachment suit, there is no description of the property to be attached required in the affidavit; and, indeed, none could therein usually be made, since the plaintiff does not then know what property of the defendant the sheriff will find; but, in attachments to enforce pre-existing liens, description is absolutely necessary.

In a suit of the latter class, the affidavit and the seizure do not create a lien. The rank of the attaching creditor does not, in this case, depend upon his being the first attacher but the right which he has before suit by reason of his already perfected lien. In a contest with an attaching creditor who

seeks, by attaching, to create a lien, he is like a mortgagee whose mortgage was recorded before the property on which it rests was attached by an ordinary creditor. If several creditors, each proceeding against the same property, each in vindication of his pre-existing lien, should have a contest for priority, the dates of the several attachments would have nothing to do with the question; for priority would be decided in accordance with the dates of the recording of the respective liens.

These and other differences between such exceptional attachment proceedings and the ordinary ones, if borne in mind by the reader, will enable him to reconcile many decisions which would otherwise appear to be at variance with each other. It is unfortunate that both classes of proceedings should bear the same name; but, keeping the obvious distinction in view, there need be no difficulty in applying to either the true principles which govern it.

Sec. 8. The Attachment Bond—in general.

The remedy by attachment being extraordinary, contrary to common law procedure, harsh and stringent in its nature, would be manifestly unjust to the debtor were he not protected when it is wrongfully employed. Were the writ issued upon the plaintiff's affidavit alone, upon his *ex parte* statements of the existence and character of the debt and of the grounds upon which the statute authorizes the extraordinary process to be issued; were his allegation that ordinary process would be inadequate because the debtor is removing, has removed or is about to remove himself or his property beyond the jurisdiction to defraud creditors, sufficient for the preliminary seizure, before judgment, of the alleged debtor's property; and were a wronged defendant without protection, great injustice would be done in many cases, and this statutory remedy could not be successfully defended. He is not, however, entirely without protection, aside from the bond. He has his action for damages caused by an abuse of the process, against the attaching plaintiff, though he have no bond to sue upon. His action for malicious attachment is not

dependent upon a bond. The requirement of an attachment bond is not universal: some of the States authorize the issue of the writ without it.

It is to relieve the attachment remedy of its possible injustice that a bond is required of the creditor for the eventual protection of the debtor, in nearly all of the States. The statutory redress by suit on the bond is convenient and commendable. The obligation is thus made a matter of written contract, leaving the obligee nothing to prove but its breach and the amount of the damage, in case of suit. It ordinarily obviates the necessity of sueing at common law, as the bond is usually sufficient to cover all actual damages.

The injured party, whether secured by an attachment bond or not; whether awarded any statutory redress or not, is still entitled to have his wrongs righted in some way. He is entitled to have full redress, whether a bond has been given or not; whether, if given, it is sufficient to cover his injury or not.

In case of malicious prosecution, the damage is often far in excess of the penal sum stipulated in the bond. The suit may be for a small sum; the statutory bond is usually fixed at double the demand, and, in several of the States, it is less; but the charge of absconding or fraudulently removing property is so serious that it gives rise to exemplary damages when maliciously made, and such damages may be many times greater than the sum nominated in the bond. Not only in making the charge, but otherwise the proceeding may be malicious. Under such circumstances, the injured defendant may recover on general principles to the extent of the wrong, either under the common[1] or the civil law.[2]

Such general remedy would not always prove adequate. An

[1] Cochrane *v.* Quackenbush, 29 Minn. 376; Nordhaus *v.* Peterson Brothers, 54 Iowa, 68; Sledge *v.* McLaren, 29 Ga. 64: Dall *v.* Cooper, 9 B. J. Lee, 574; Sanders *v.* Hughes, 2 Brevard, 495; Smith *v.* Eakin, 2 Sneed, 456; Churchill *v.* Abraham, 22 Ill. 455; Donnell *v.* Jones, 13 Ala. 490; Pettit *v.* Mercer, 8 B. Mon. 51; Bruce *v.* Coleman, 1 Handy, 515; Roach *v.* Brannon, 57 Miss. 490; Smith *v.* Story, 4 Humph. 169.

[2] Burne *v.* Gardner, 33 La. Ann. 6; Teal *v.* Lyons, 30 La. Ann. Part I, 1140; Senecal *v.* Smith, 9 Rob. (La.) 418; Grant *v.* Deuel, Id. 17. The general rule of the civil law respecting damages in general, is expressed as

irresponsible plaintiff might ruin a defendant in business or reputation; and if the latter should have recourse only against the wrong-doer, he might be unable to execute any judgment for damages. The utility of the attachment bond is apparent in such a case. The obligation of the plaintiff to repair any wrong he may do is not thus enhanced, but the defendant has thus the advantage of the security given. He may test the ability and solvency of the surety, and have the attachment dissolved if the bond prove insufficient.

The requirement of a bond from the plaintiff, with security, as a prerequisite to his obtaining of the writ, is now pretty general under the prevalent practice of attaching to create and enforce a lien; though it was not so when attaching property was a substitute for attaching the person of the debtor and was a resort for the purpose of compelling him to appear and enter bail. The difference between foreign attachment under the custom of London, and domestic attachment wherever it has been practiced as a distinct remedy, with regard to the bond, has not wholly disappeared. Where the two are still distinguished, the plaintiff is not now required to give bond in favor of a non-appearing and unnotified non-resident defendant till after judgment *nisi*, when he obligates himself with surety to restore, etc., in case the defendant appear within a year, etc. In some States, even where foreign and domestic attachment are not regarded as two distinct proceedings, no bond is exacted in an attachment suit against a non-resident or a foreign corporation, prior to the issuance of the writ.[1]

follows: "Every act whatever of man, that causes damage to another, obliges him by whose fault it happened, to repair it:" Civil Code of La., art. 2294. Also, Id. arts. 2295, 2296, 2304. *Code Napoleon*, Arts. 1382–6; Droit Civil de Toullier, liv. II tit. 8 § 284; liv. III, tit. 4; Domat, (Strahan,) Part I, Book III, tit. 5, sec. 2, art. 14. Duranton, tom. 13 § 729; Partida 3. tit. 32, l. 10, 11; Pothier on Obligations, § § 121, 453.

[1] Marsh *v.* Steele, 9 Neb. 96; Olmstead *v.* Rivers, Id. 234; Nebraska Code, § 200; Simon *v.* Shelter, 25 Kan. 155. Kansas General Statutes. In Ohio, no bond is required in an attachment suit against a non-resident or foreign corporation. In Delaware, where the two kinds of attachment are distinguished, the old theory is maintained in both, and a bond or undertaking is required in both, (when the defendant does not appear and terminate the attachment proceedings by giving special bail,) but

The practice is now general, though not universal, to require the bond preliminarily, with the view to final judgment and privilege upon the property attached. It is, when so required, an essential prerequisite to the writ, and a jurisdictional matter. It obviates the necessity of giving pledges to restore, since it protects the absent defendant as well as such undertaking could do, and, at the same time, protects the defendant who appears and pleads. It is because appearance does not now, of itself, dissolve attachment, that the bond is required whether he responds to summons or notification or remains in contumacy and default. The exceptional States, where the bond is not required, leave the injured defendant to his common-law remedy. And those which limit the requirement to special grounds, leave to the defendant the same resort in cases of attachment instituted on other grounds.

If the defendant is confined to his common law remedy, he cannot recover damages merely because a plaintiff has sued him and has failed in the suit, but the *onus* is on the complainant to show that he has been proceeded against, without probable cause and maliciously, to his injury. If sued upon ordinary process illegally and maliciously, he would have the same remedy at common law. It is the right of any citizen, and often the right of any other person, to sue in the courts; and the suitor is not necessarily liable in damages when he has made a mistake as to his rights and brought an action upon which he cannot recover. Before he can be mulct in damages for bringing the suit, it must be shown that he brought it maliciously or at least without probable and apparently reason-

not till the creditor is about to receive the proceeds of the attached property from the appointed auditors, when he enters into recognizance, with surety, to repay in case the debtor appear within a year and a day, etc. Maryland retained this practice till a recent date, and so did some other States. She still allows attachment without bond when the debtor is a non-resident. In Pennsylvania, foreign attachment is deemed a matter of right. A bond is there required in domestic attachments where fraud is an element of the alleged ground. In Alabama it has been held that there should be a bond to secure a non-resident defendant who does not appear. Erwin *v.* Ferguson, 5 Ala. 158; Walker *v.* Bank of Mobile, 6 Id. 452.

able cause. The presumption of good motives is attributed to him, even though the law and the evidence turn out to be against him; and therefore, in an action at common law for damages in a suit by ordinary process, the complainant must clearly show wrong motives on the part of the suitor as well as injury resultant. So, where there is no statutory requirement of an attachment bond; where the law gives the creditor a right to the extraordinary process upon his affidavit of a debt and grounds such as the law recognizes as the proper basis of such action, the injured defendant's common law remedy for redress is much like that for a malicious ordinary suit.

Sec. 9. The Attachment Bond—Amount.

The amount of the bond is fixed by statute. No State can reasonably make it less than enough to indemnify the defendant against eventual loss as actual damages. As the plaintiff aims to make seizure of sufficient property to satisfy his claim and all the costs, he ought to give bond for a sum adequate to cover both the loss and expense of the defendant in case the writ of attachment should be unlawfully obtained, and the plaintiff should fail to obtain judgment. In many instances, a bond limited to the estimated value of the property to be seized, with the probable costs added, would not render the defendant perfectly secure. In case of the seizure of a thing both imperishable and unproductive, a bond in a sum equal to its value would be more than sufficient. But there must be some rule in every State. The gage is found in the amount of the debt sworn to in the affidavit. With this criterion, the amount of the bond is variously fixed in different States: double the debt, one-half above the debt, etc. If the claim is for debt and interest, the amount claimed is the gage, and the interest must be included in fixing the sum for the purposes of the bond;[1] but such is not the case when interest is merely

[1] McDaniel *v.* Sappington, Hard. 94. Gallagher *v.* Cogswell, 11 Fla. 127; Brown *v.* Whiteford, 4 Rich. 327; Graham *v.* Burckhalter, 2 La. Ann. 415; Planter's Bank *v.* Byrne, 3 La. Ann. 687. It is held in New York that a deposit cannot be substituted for the required undertaking: Bate *v.* McDowell, 48 N. Y. (Super. Ct.) 219.

mentioned but not made part of the debt sworn to in the affidavit. Where there is discrepancy between the affidavit and the petition or declaration, the amount sworn to in the affidavit should be the standard for fixing the sum in the bond.[1] In forms of action not setting forth the exact sum sued for, if the affidavit does not indicate the amount, the writ is the gage for fixing the amount of the attachment bond.[2] Where a round sum is sued for, as debt and damages, it is understood to include interest, and the bond is based upon it, being twice that sum where doubling is the rule.[3]

Though the bond is good if large enough when compared with the sum sworn to in the affidavit, while a larger sum may be claimed in the petition or declaration, yet the overplus in the latter would not, in such case, be secured by the attachment lien. But should the bond be less than the sum sworn in the affidavit requires, the attachment could not be maintained. It would not be good to the amount stated, and bad as to the balance, but it would be wholly bad, and the proceedings could be set aside on such ground.[4]

It is needless to say that if a bond is greater than what the law requires, no harm can thus result to the defendant, and the instrument would not therefore be invalid;[5] but the statute requirement must be strictly observed up to the fixed amount. There is nothing more imperative in the attachment laws generally than that the creditor shall give bond and security in the sum which the legislator has decided to be requisite for the indemnification of the defendant in such damages as he may suffer by reason of the attachment. Though the amount

[1] Pope *v.* Hunter, 13 La. 306; Jackson *v.* Warwick, 17 La. 436; Lawrence *v.* Featherston, 10 Smedes & M. 345.

[2] Callender *v.* Duncan, 2 Baily, 454; Young *v.* Grey, Harper, 38; Brown *v.* Whiteford, 4 Rich. 327.

[3] Id.

[4] Fleitas *v.* Cockrem, 101 U. S. 301; Hamble *v.* Owen, 20 Iowa, 70; Yale *v.* Cole, 31 La. Ann. 687; Marnine *v.* Murphy, 8 Ind. 272; Martin *v.* Thompson, 3 Bibb, 252; Williams *v.* Barrow, 3 La. 57; Samuel *v.* Brite, 3 A. K. Marshall, 317; Hamnill *v.* Phenicie, 9 Iowa, 525.

[5] Ranning *v.* Reeves, 2 Tenn. Ch. 263; Bourne *v.* Hocker, 11 B. Monroe, 21; Shockley *v.* Davis, 17 Ga. 175; Fellows *v.* Miller, 8 Blackford, 231; Steamboat Napoleon *v.* Etter, 6 Ark. 103.

be fixed by the court, it will not suffice unless the sum is as great as that required by statute.[1]

The pleader should strictly follow the statute, in stating the conditions of the bond, preferring any prescribed form therein to directions in other parts of the statute, where there is incongruity.[2] He should insert what is necessary to identify the bond with the suit.[3] Anything that would surely mislead the defendant with regard to the suit, the court, the return day, *etc.*, would render the bond vicious. Slight mistakes which cannot thus mislead would not render the bond fatally defective, with respect to the particulars just specified or any others. If there is strict compliance with the statute in essentials, and a substantial compliance in non-essentials, the attachment ought not to be quashed. Even if the mistake be somewhat important, there should be liberality in the allowance of amendment, where the court has discretion.

The statute requirement, as to the amount of the bond, must be strictly observed; and the conditions required must be explicitly set forth in the bond.[4]

Sec. 10. The Attachment Bond—The Obligors.

The bond is made and signed by the attaching creditor as the principal obligor. A disinterested person could not become

[1] Fleitas *v.* Cockrem, 101 U. S. 301; Graham *v.* Burckhalter, 2 La. Ann. 415. In Louisiana, the bond must be one half above the amount claimed: above cases, and Williams *v.* Barrow, 3 La. 57; Jackson *v.* Warwick, 17 La. 436.

[2] McCook *v.* Willis, 28 La. Ann. 448; United States *v.* Brown, Gilpin, 155; Love *v.* Fairfield, 10 Ill. 303; McIntyre *v.* White, 5 How. (Miss.) 298; Lucky *v.* Miller, 8 Yerger, 90; Amos *v.* Allnutt, 2 Smedes & M. 215; Proskey *v.* West, 8 Id. 711; U. S. *v.* Morgan, 3 Wash. C. C. 10; U. S. *v.* Gordon, 7 Cr. 287.

[3] Jaycox *v.* Chapman, 10 Ben. 517; Scrimpf *v.* McArdle, 13 Tex. 368; Morgan *v.* Morgan, 4 Gill & Johns. 395; Briggs *v.* Smith, 13 Tex. 269; Laurence *v.* Yeatman, 3 Ill. 15; Bonner *v.* Brown, 10 La. Ann. 334; Benedict *v.* Bray, 2 Cal. 25; Planters and Merchants' Bank *v.* Andrews, 8 Porter, 404. *See* Houston *v.* Belcher, 12 Smedes & M. 514; Lowry *v.* Stowe, 7 Porter, 483.

[4] Benedict *v.* Bray, 2 Cal. 251; Starr *v.* Lyon, 5 Ct. 538; Thompson *v.* Arthur, Dudley, 253; Cousins *v.* Brashier, 1 Blackf. 85; Ford *v.* Woodward, 10 Miss. 260; Stevenson *v.* Robbins, 5 Mo. 18; Homan *v.* Brinkerhoff, 1 Den. 184; Davis *v.* Marshall, 14 Barb. 96; Bank of Alabama *v.* Fitzpatrick, 4 Humph. 311; Briggs *v.* Smith, 13 Tex. 269; Jones *v.* Anderson, 7 Leigh, 308.

the principal within the intendment of the law; certainly the courts cannot issue attachments unless the creditor himself is the obligor, where the statute requires him to become such.[1]

It is not imperative that the plaintiff, or the person interested, should actually sign the bond, but it may be done by an agent duly authorized, when the principal cannot do so, for any good reason, as in the case of the making of the affidavit. In such case, the agent signs for the plaintiff, as his attorney for doing so; the act is deemed that of the plaintiff; the latter is fully bound to the defendant, and the requirement of the law is obeyed.[2] If the suit is by a firm, one of the firm may sign the partnership name; and should he sign only his own but appear as the representative of the firm and have authority to obligate the partnership, it would be sufficient.[3] It is not a compliance with the law, if a member of a plaintiff firm obligates only himself;[4] for, though such bond would hold good against him, the attachment ought to be dissolved upon application for the reason that the interested firm is not bound, and the defendant is not secured as he is entitled to be.

Not only a member of a firm representing himself and his partners, but any agent representing his principal should sign in the capacity in which he appears. It must be such a signing as to bind the principal; not such as merely to hold the person making the signature. Such obligation satisfies the law, especially where it is provided that the signing may be done by an agent or attorney of the plaintiff.[5]

The true rule is that the bond must be signed and executed so as to bind the plaintiff or the party interested in sueing out

[1] Jones *v.* Anderson, 7 Leigh, (Va.) 308; Ford *v.* Hurd, 12 Miss. 683; Myers *v.* Lewis, 1 McMullen, (S. C.) 54; Mantz *v.* Hendley, 2 Hening & Munford, 308.

[2] Frost *v.* Cook, 8 Miss. 357; Taylor *v.* Richards, 9 Ark. 378.

[3] Churchell *v.* Fulliam, 8 Iowa, 45; Wallis *v.* Wallace, 6 How. (7 Miss.) 254; Cunningham *v.* Lamar, 51 Ga. 574; Kyle *v.* Connelly, 3 Leigh, 719.

[4] Stewart *v.* Katz, 30 Md. 334; Gable *v.* Brooks, 48 Md. 108; Jones *v.* Anderson, 7 Leigh, 308.

[5] Frost *v.* Cook, 8 Miss. 357; Page *v.* Ford, 10 Miss. 266; Ford *v.* Hurd, 12 Miss. 683; Dillon *v.* Watkins, 2 Speers, 445; McCandish *v.* Hopkins, 6 Call, 208; Conklin *v.* Goldsmith, 5 Fla. 280; Simpson *v.* Knight, 12 Fla. 144; Martin *v.* Dortch, 1 Stew. 479; Stewart *v.* Katz, 30 Md. 334.

the attachment; and whether the agent's signature is sufficient for that purpose may appear, so as to give validity to the bond, without his formal statement of his real capacity—provided that such capacity is, in some way, apparent beyond controversy so as to enable the defendant to sue the plaintiff upon the bond, should suit become necessary. Should the bond show that the plaintiff is bound, it would be good, though there might be nothing in the signature to show that the agent signed in any other than his personal capacity.[1]

The requisite showing in the bond or the signature thereto is not such as to make the production of a power of attorney necessary. Doubtless, in the absence of the plaintiff, the court might require the professed agent to produce his authority before granting the writ, but it is not usual to do so. The fact of the suit being prosecuted by the plaintiff upon the bond and affidavit filed, shows that he has assented to them and is acting as if bound by them. This creates a presumption in favor of their authorization when questioned, so far as the relation of the plaintiff to the ostensible agent is concerned.[2] But the court ought to require that the bond be complete in itself, before issuing the writ; and the defendant, in case he should have to sue upon the bond, ought not be subjected to the necessity of producing other evidence that the plaintiff is bound by it.

Where the bond may be signed for the plaintiff by his attorney, it is not uncommon that his attorney at law represents him,

[1] Walbridge *v.* Spalding, 1 Doug. (Mich.) 451; Page *v.* Ford, 10 Miss. 266; Work *v.* Titus, 12 Fla. 628; Clanton *v.* Laird, 20 Miss. 568; Murray *v.* Cone, 8 Port. 250; Frost *v.* Cook, 7 How. 8 (Miss.) 357; Grand Gulf R. R. & B. C. Co. *v.* Conger, 9 Smedes & M. 505.

[2] Jacobs *v.* Hogan, 85 N. Y. 243; Jackson *v.* Stanley, 2 Ala. 326; Pierce *v.* Strickland, 2 Story, 292; Lindner *v.* Aaron, 5 How. (Miss.) 581; Taylor *v.* Sutt, 6 La. Ann. 709; Wood *v.* Squiers, 28 Mo. 528; Mason *v.* Stewart, 6 La. Ann. 736; Goddard *v.* Cunningham, 6 Iowa, 400; Brooks *v.* Poirier, 10 La. Ann. 512; Spear *v.* King, 14 Miss. (6 Smedes & M.) 276; Narraguagus *v.* Wentworth, 36 Me. 339; Alford *v.* Johnson, 9 Porter, 320. (See Williams *v.* Reed, 3 Mason, 405;) Messner *v.* Hutchins, 17 Tex. 597; Wright *v.* Smith, 19 Tex. 297; Messner *v.* Lewis, 20 Tex. 221.

signing only in his professional capacity.[1] But one who is licensed as attorney to represent, in a professional way, all who employ him, is not thus authorized to bind his client beyond the scope of his employment. Though engaged to institute and prosecute an attachment suit, he is not therefore empowered to bind his client by signing an attachment bond for him. It cannot truly be said that the execution by him of such a bond is an incident of his employment. Though it has been judicially said that the signing of the bond by an attorney at law is an act of administration—that it is indispensible to secure the rights of the client—that the attorney at law of the plaintiff is his mandatory for the purpose of collecting the debt by process of law—that the signing of the bond is a necessary incident to the collection—and that it is embraced in the general power given by the client to his attorney at law,[2] yet it must be denied that a bond thus executed would bind the client, should he not ratify it by proceeding with the litigation thereunder. The court might accept such a bond on the presumption that a licensed attorney acted within his authority when signing ostensibly for his principal; but in case of a suit upon the bond, the client could not be held if there should be no other evidence of authority on the part of the attorney than his employment as the lawyer of a client who had repudiated his act of signing before any proceeding thereon. Certainly the lawyer should have power conferred, beyond that given by his license and his engagement as attorney in the cause, though the power need not be evidenced by any written instrument. If ruled into court to show the authority under which he acted in signing the bond for his client, the attorney at law could not make an adequate showing by merely producing his license and proving his engagement as the plaintiff's lawyer in the case. Though the attachment proceedings might not be quashed for want of the proper showing upon such a rule, after some progress in the suit had been made under a bond thus executed,[3]

[1] Foulks *v.* Falls, 91 Ind. 315, 321; Trowbridge *v.* Weir, 6 La. Ann. 706.

[2] Wetmore *v.* Daffin, 5 La. Ann. 496; Schoregge *v.* Gordon, 29 Minn. 367.

[3] Mandel *v.* Peet, 18 Ark. 236;

it is because the plaintiff, by thus going on, is understood to have assented to the attorney's action and to have become bound thereby. Even were they quashed on this ground after some progress, at the instance of the defendant, the plaintiff would be held obligated by such a bond on account of his acquiescence during such progress.[1] And this reasoning applies to bonds executed by other attorneys than those at law, who sign without being previously authorized by their assumed principals, in some way, but whose action is subsequently ratified expressly or impliedly.

The surety must sign with the principal, obligating himself to pay if the plaintiff does not. He must be a resident of the State, in solvent circumstances, able to meet his obligation.

He should sign personally. If he sign through an agent, the authority of the latter should be made to appear; for the surety, not being a party to the suit, could not be said to acquiesce in the action of the agent by reason of the progress of the cause—he not being presumed to have known of such progress or even of the execution of the bond.

If he who signs as surety the name of his firm does not produce authority so to do, he does not bind the firm unless the articles of partnership go beyond the usual contract and empower the members of it, (or at least the member so signing,) to obligate the firm in this way. He would bind himself but not the partnership to which he belongs. If he is competent to sign, so far as residence, solvency, pecuniary ability, proper age, etc., are concerned, the bond would be good; and the defendant could not successfully attack it on the ground that the surety had not signed his own name but that of his firm. The firm style included his own name. In seeking to bind all, he bound himself. And, should the defendant not complain, the surety himself cannot, for he must stand by his own act.[2] Between himself and his partners, however, all the members would be bound for their equal portion should he have to pay,

Dove *v.* Martin, 23 Miss. 588; Bank of Augusta *v.* Conrey, 28 Miss. 667; Peiser *v.* Cushman, 13 Tex. 390.

[1] Messner *v.* Lewis, 20 Tex. 221; Peiser *v.* Cushman, 13 Tex. 390.

[2] Thatcher *v.* Goff, 13 La. 360.

if he signed with their knowledge or subsequent acquiescence.

It is not uncommon for principals and sureties to sign firm designations to bonds instead of the names of the members of the partnership, and it is usually allowed without objection from the courts or the defendants;[1] but, as remarked, this binds only the person signing, unless the firm has given him authority.

Solvency, residence within the State, lawful age, etc., are presumed till the contrary is made to appear. Such facts need not be stated in the bond, though the statute may expressly require such qualifications in a surety. If the statute requires sureties, more than one should be given provided no other construction of the meaning is permissible; but, the object of the legislature being to secure the defendant and ultimately indemnify him against loss,[2] one good surety will be sufficient, notwithstanding the words of the statute, in those States where singular and plural numbers are legally interchangeable for the purpose of statute construction.[3] And where the courts are not expressly accorded this latitude of construction, one surety may suffice unless it is clearly the meaning of the statute that there should be more for the better protection of the defendant.

If there is but one name signed to an attachment bond, it will be deemed that of the surety when the body of the bond and the pleadings of the case disclose another as that of the plaintiff; and the bond will not be fatally defective because the attaching plaintiff has not signed it, since he is under obligation as principal whether he signs or not.[4]

The omission of the surety's name, in the body of the bond, is not fatal; his signature would bind him notwithstanding such omission.[5]

When the surety binds himself to "pay all costs that may be adjudged to the defendant and all damages which he may

[1] Raymond *v.* Green, 12 Neb. 215; Danforth *v.* Carter, 1 Iowa, 546; Churchill *v.* Fulliam, 8 Iowa, 45. *See* Bennett *v.* Zabriski, 2 N. Mex. 176.

[2] Adams *v.* Jacoway, 34 Ark. 542.

[3] Elliot *v.* Stevens, 10 Iowa, 418; Bryant *v.* Hendee, 40 Mich. 543.

[4] Balt. & O. R. R. Co. *v.* Taylor, 81 Ind. 24.

[5] McLain *v.* Simington, 37 Ohio St. 484, explaining Stephens *v.* Allmen, 19 Id. 485.

sustain by reason of the attachment" he may be held for the defendant's disbursements duly allowed.[1] He cannot be held for a greater sum than that specified in the bond; and, if his principal has paid part of that, the surety remains liable only for the balance.[2] And the whole amount can be collected only in case of total loss. The measure of damage is the pecuniary loss caused the defendant by deprival of the use of his property, by any injury done to it, by any waste, etc., and also by the expense of defending it.[3] Sureties have been held answerable for the costs and disbursements of the obligee, not only in his defense against a wrongful attachment, but also in his prosecution of an action on the bond for damages.[4]

The surety, being concerned in the result of the suit, could not be a witness for the plaintiff where interest renders witnesses incompetent to testify; and, where it does not, the fact of being pecuniarily liable in case the attachment should injure the defendant would affect the credibility of the surety as a witness. In such case, may the plaintiff release him and substitute another surety? With the assent of the defendant he may; and, if no liability has yet occurred, the court may permit the exchange, under such circumstances, even without such assent.

May additional security be given by the plaintiff if the one first given has subsequently become insolvent? The law gives him his right of action; he has complied with the requirement that good and solvent security should be given; it is owing to no fault or *laches* of his that he now finds himself without a firm foundation: why should he not be allowed to offer a new bondsman? Clearly it is the right of the defendant to have the attachment dissolved because of the insufficiency of the bond, whenever it shall become insufficient, at any stage of the cause; and therefore, the plaintiff should be accorded the right

[1] Under § 144 of the Oregon Civil Code, it was held that the surety was obligated for such disbursements though not all incurred by the defendant in the attachment suit. Bing Gee *v.* Ah Jim, 7 Saw. C. C. 117.

[2] Baere *v.* Armstrong, 62 How. (N. Y.) Pr. 515, (26 Hun. 19.)

[3] Boatwright *v.* Stewart, 37 Ark 614

[4] Bing Gee *v.* Ah Jim, 7 Saw. 117.

of maintaining his cause by repairing what has become defective through no fault of his. Of course the case would be altogether different if the bondsman was worthless from the start and the plaintiff has only discovered the fact after the institution of the suit. In such case he must suffer the result. His suit may be dissolved upon application of the defendant in a legal way, and the plaintiff cannot repair the breach at the expense of his opponent.

Suppose the surety to be sound at first but insolvent subsequently, and the plaintiff should not tender other and better surety: may the defendant, (instead of moving to quash, or filing a plea in abatement,) take a rule on the plaintiff to make him give a new bondsman? The defendant may not choose to have the proceedings quashed at this stage. The plaintiff may be insolvent as well as the surety; and, if so, what recompense is the defendant to have for the wrong done him in case of an illegal and pecuniarily disastrous attachment? The suit may have been of several months standing; a steamboat, ship or other valuable property may have been in custody of an officer under the attachment seizure, causing great loss; and now must the defendant be told that his only course is to get rid of the attachment and recover his property without any indemnification for loss?

In any State where these questions are not solvable by statute provisions, they should, in justice and reason, be answered so that no wrong can be done to either plaintiff or defendant; *i. e.*, new bondsmen should be substituted upon application of either party.

The plaintiff must lie on the bed he has made. He cannot substitute one surety for another as a matter of right, nor can the court confer such right when the bond was worthless *ab initio* by reason of the insolvency of the surety, unless such power is given to the court by statute. The conferring of such authority, to be exercised in case of the death of the surety, or his removal from the State, or his insolvency, or his likelihood to become insolvent, is found in the statutes

of at least one State; in some others, the authority is not so broad.[1]

Although the subject of the amendment of bonds, hereafter to be noticed, includes the subject of the bettering of the security, the substitution of a good bondsman for one who has ceased to be sufficient since he was given and accepted rests upon somewhat different grounds than other forms of emendation.

The substitution of a sufficient bondsman for an insufficient one cannot be made by the Supreme Court when the case is there on appeal.[2]

Prior to the issuance of the writ, there is no reason why the plaintiff may not amend a defective bond. Though the affidavit, bond and petition have been filed, he ought to be allowed by the court to amend any one of these, as a matter of course, when no action has been taken upon his prayer. Should the court refuse to allow this, he may withdraw his suit and make such amendments as he chooses to make, and institute it again. It is the proper course for him to pursue in such a case. It is far better than to go on and find at a later stage that his proceeding has fatal and incurable defects. And in nothing is it more important than with respect to the bond, that he should be clearly within the law. If there are defects with regard to the surety's signature, solvency or competency; the amount or conditions or form of the bond, or any other matter, the plaintiff ought to make all sure before the issuing of the writ, while it is in his power to discontinue and begin anew, should the court refuse to permit him to make the necessary changes.

When other interests than the plaintiff's have intervened, the plaintiff cannot change his bond as a matter of right. The defendant is entitled to a good bond, but his right to dissolve the attachment because such has not been tendered is not to be defeated by an order of court permitting the plaintiff to

[1] Van Arsdale *v.* Krum, 9 Mo. 397: the statute extending to any insufficiency of the bond; Branch of State Bank *v.* Morris, 13 Iowa, 136.

[2] Durham *v.* Lisso, 32 La. Ann. 415.

amend.[1] Where the court has authority to make such order upon application of the plaintiff, there must have been statutory creation of the power;[2] and though such power has been conferred, it is far better that the attaching creditor be in a situation not to invoke it, since there is always a question whether the court will feel obliged to exercise such authority in any given case. It is not safe for him to risk a defective bond, though it be such as to hold in case the defendant takes no proceedings to quash after first giving him opportunity to make the bond good.[3]

[1] In Missouri, the suit is not dismissed because the bond is insufficient, until opportunity has been given to file another: Cummings *v.* Denny, 6 Mo. App. 602. Otherwise in Florida: Roulhac *v.* Rigby, 7 Fla. 336.

[2] Proskey *v.* West, 16 Miss. (8 S. & M.) 711; Van Arsdale *v.* Krum, 9 Mo. 397; Jasper County *v.* Chenault, 38 Mo. 357; Lowry *v.* Stone, 7 Porter, 483; Jackson *v.* Stanley, 2 Ala. 326; Conklin *v.* Harris, 5 Ala. 213. See Tyson *v.* Lansing, 10 La. 444.

[3] Erwin *v.* Ferguson, 5 Ala. 158; Benedict *v.* Bray, 2 Cal. 251; Lea *v.* Vail, 3 Ill. (2 Scam.) 473; Wood *v.* Squiers, 28 Mo. 528; Beardslee *v.* Morgan, 29 Mo. 471; Henderson *v.* Druce, 30 Mo. 358; Starr *v.* Lyon, 5 Ct. 538; Planters' & Merchants' Bank *v.* Andrews, 8 Porter, (Ala.) 404; Lowe *v.* Derrick, 9 Porter, (Ala.) 415; Scott *v.* Macy, 3 Ala. 250; Oliver *v.* Wilson, 29 Ga. 642; Irwin *v.* Howard, 37 Ga. 18; Tevis *v.* Hughes, 10 Mo. 380; Wood *v.* Squires, 28 Mo. 528.

CHAPTER IV.

PROCESS.

§ 1. The Summons.
2. The Writ—in General.
3. " —as to Property.
§ 4. The Writ—Protecting the Officer.
5. The Indemnifying Bond.

Sec. 1. The Summons.

The summons issued to the defendant in an attachment suit differs in no respect from that issued in a suit to recover debt in which there is no writ of attachment issued. It will therefore be unnecessary to dwell long on the subject. When the defendant is reached, being either personally served or served by the leaving of the summons at his domicile with one legally competent to receive it for him, the personal suit against him is fully instituted, and may be prosecuted to judgment for the full amount claimed in the petition. And when a copy of the writ of attachment is served upon him (or left as before stated with regard to the summons,) and property of his is attached, the attachment suit is fully brought and may be prosecuted to judgment with judicial recognition of the lien or privilege created by the attachment.

Acceptance of service by the defendant would obviate the necessity of a summons; so would his voluntary general appearance in the absence of citation; but the writ of attachment and its execution by the seizure of property is no substitute for summons. It is not such, either with reference to the personal or to the property action. However, the writ might answer as a summons if served on the defendant, even though defective as a writ.[1] In Pennsylvania it has been held that foreign attachment is *mesne* process, "equivalent to a summons for the commencement of a personal action."[2]

[1] Wasson *v.* Cone, 86 Ill. 46.

[2] Cornman's Appeal, 90 Pa. St. 254.

The statutes are uniform, in all the States, in the requirement that effort be made to effect personal service upon the party charged as defendant. There is nothing in this different from the practice in personal suits generally, when the personal character of the attachment suit is considered. At this stage, the suit is nothing more than a personal one where the statute requires that the summons shall be issued before the writ of attachment.[1] But where the writ is issued with the summons, the proceeding already possesses a dual character. In such case, the summons has reference to the ancillary suit as well as to the principal. It need not contain any expressed reference thereto, since the service of the attachment writ conveys all the necessary notice regarding it to the defendant, when it is served upon him.

The ancillary suit, however, cannot be said to be instituted against the defendant's property so as to be binding upon him, unless the defendant be served, or notified by publication after an effort to serve has failed. Herein it differs from a libel suit against a thing irrespective of the owner. In the latter, summons is never issued. The reason is there is no personal defendant to be served.

The summons, in an attachment suit, is directed to, and restricted to, the personal debtor or debtors named in the petition as defendant to the action. It is not directed to persons holding liens on the attached property or otherwise interested in it. The proceeding does not necessarily affect their rights.

A summons not good in the personal action is not good with respect to the ancillary proceeding. A statute of Michigan provides that, in suits commenced by attachment in favor of a resident against any corporation created by another State, if a copy of the attachment with an inventory of the property attached shall have been personally served on any officer, member, clerk or agent of such corporation within the State of Michigan, the same proceedings shall be had thereupon, and with like effect as in case of attachment against a natural person,

[1] Hall *v.* Grogan, 78 Ky. 11: The attachment is void if granted before the summons. Summons should be personal, or at the domicile: Walker *v.* Barrelli, 32 La. Ann. 467; Speigelberg *v.* Sullivan, 1 New Mex. 575.

which shall have been returned served in like manner upon the defendant.[1] Commenting upon a case against a foreign corporation which had been proceeded against under this law, the Supreme Court of the United States remarked that the writ seems "to serve a double purpose,—as a command to the officer to attach the property of the corporation, and as a summons to the latter to appear in the suit;" and added: "Without considering whether authorizing service of a copy of the writ of attachment as a summons on some of the persons named in the statute—a member, for instance * * * is not a departure from the principle of natural justice mentioned in Lafayette Insurance Co. *v.* French,[2] which forbids condemnation without citation, it is sufficient to observe that we are of the opinion that when service is made within the State upon an agent of a foreign corporation, it is essential, in order to support the jurisdiction of the court to render a personal judgment, that it should appear somewhere in the record * * * that the corporation was engaged in business in the State." In other words, the summons was held not good upon the corporation because not served upon any person authorized by it to represent it. Yet, previously the court had said that if the attaching creditors were residents of Michigan, "the jurisdiction of the court, under the writ, to dispose of the property attached, cannot be doubted, so far as was necessary to satisfy their demand. No question was raised as to the validity of the judgment to that extent. The objection to it was as evidence that the amount rendered was an existing obligation or debt against the company. If the court had not acquired jurisdiction over the company, the judgment established nothing as to its liability, beyond the amount which the proceeds of the property discharged."[3] It is further stated that the company or corporation made no appearance. There was no publication notice. The *quere* is, How could the writ as a summons be good in the ancillary action yet not in the personal or principal suit? How can there have been jurisdiction in either? Was not the decree

[1] Howell's Stat. § § 8138, 8143.
[2] 18 How. 404.
[3] St. Clair *v.* Cox, 106 U. S. 350.

against the property attached "*a departure from the principle of natural justice* * * * *which forbids condemnation without citation?*" Elsewhere in this treatise it is shown that seizure does not relieve from the necessity of notice on failure of summons, in attachment suits, and seldom in any other class of actions *in rem*. That the court is not to be understood as deciding that there was jurisdiction, appears from the fact that "no question was raised as to the validity of the judgment," in the ancillary suit, without appearance, without valid summons and without publication.

The summons should inform the defendant within what delay he is required to appear. If it erroneously state less time than the law allows, doubtless there could be no valid default entered for non-appearance within the stated period, and the defendant might lawfully plead at any time before the expiration of the period fixed by law; but it has been held that such default would not be absolutely void; that a summons erroneous by reason of such limitation is amendable, and like errors curable.[1] Where six days were stated when ten was the legal period, and an order of publication was granted because the return showed that the defendant was not found, and the party afterwards personally appeared and sought to set aside the proceeding on account of the illegality of the summons, the court allowed it to be amended *nunc pro tunc*.[2] It was certainly the right of the defendant to appear within ten days from service, had he been served; but, when he could not be found within reasonable time, and the officer had returned that after diligent search the defendant could not be found, it is difficult to see how the mistake in the summons could affect the default. When that mistake had been corrected, the defendant stood as though it had never been made. He could yet set aside the default upon other grounds and file his answer.

If the officer make a mistake in his return of the summons; if, for instance, he should report that he has left the citation at

[1] Watkins *v.* Stevens, 3 How. Pr. 28; Clapp *v.* Graves, 26 N. Y. 418; McCoun *v.* New York etc., R. R. Co. 50 Id. 176; Bradbury *v.* Van Nostrand, 45 Barb. 194; Holmes *v.* Russell, 9 Dowl. 487; Catlin *v.* Rickets, 91 N. Y. 668.

[2] Gribbon *v.* Freel, 93 N. Y. 96.

the residence of the defendant when he has really left it at another house, the summons would be worthless if the return could be contradicted. If the fact of the mistake were brought to the knowledge of the court by an amended return, no disastrous consequences would necessarily result; but if the officer should insist upon his report as at first made, so that it could not be corrected by parol evidence, he would be liable for whatever injury he might cause, and the return would not screen the attaching creditor when sued for damages [1]

Sec. 2. The Writ—in General.

Under the attachment system now prevailing, the writ commanding the officer to seize property of the debtor is not issued in default of ordinary process; that is, it is not granted because there has been a return of a previously issued summons showing that the defendant has not been found, as was formerly the case when the object of attachment was to compel appearance. Now the summons and the writ may go out together; for the present purpose is not only to cite the defendant but also to create immediately a lien upon his property to conserve it for eventual execution. The affidavit having afforded *ex parte* evidence that ordinary process would be inadequate and that the conditions exist under which the statute allows the extraordinary; and the bond having been given to protect the defendant against any abuse of the latter, the next step is the issuance of the order for taking from the defendant any property of his not exempt from execution, and for attaching in the hands of others what may be due him by them, or held for him by them, to the amount of the debt and probable costs.

There is now, from the incipiency of the proceedings, a dual action; a movement against the defendant to obtain a personal judgment against him, and a movement against his property when attached, to obtain a judgment which shall be, in effect, against that: susceptible of being executed against that only if he shall not be summoned and shall not appear though notified by publication; susceptible of being executed against that or

[1] Buckingham v. Osborne, 44 Ct. 133.

any other property if he shall have been summoned or shall have appeared and shall have had judgment rendered against him with privilege upon the property attached.

The issue of a summons is no less essential now than formerly. The difference is that it need not be returned void before the writ of attachment can be issued. Attachment of the body of the debtor for debt having been abolished, it can no longer be said that the attachment of his property is a substitute for that, and that he is brought into court by his property. Indeed, the custom of London did not go so far as that, though some decisions, rendered even since the abolishment of personal arrest for debt, seem to have been written under the impression that such was the case. True, the purpose was to compel appearance; but there was no procedure on the assumption that the purpose was effected by the seizure; that is, the debtor was not deemed to be in court because his property was. This plainly appears from the circumstances that four proclamations, at different times, calling upon him to come into court, must be made before a judgment by default could be rendered; that the plaintiff was required to give pledges to restore in case the defendant should appear within a year and a day; and that final judgment could not be rendered because the defendant was not in court.[1]

The proceedings were not dual under the custom; they were personal in case the defendant appeared and entered bail as in any ordinary action; they were personal if he did not appear, but they could result only in a judgment by default for non-appearance to be perfected only by the legal prescription of a year and a day. They were, in this respect, rather a procedure by legal distraint for debt than a suit at law in the proper sense of the term.

Under the system now generally prevailing in this country, the attachment writ should be so issued and so executed as to prove effective in case the suit should prove to be *in rem* only, so far as concerns its effect. The creditor should be as cautious

[1] Locke on For. Att. *2, *3, citing, to show the custom, 1 Rol. Abr. Customs of London, K. 1, 3 and 4; Horton *v.* Beckman, 6 T. R. 760; Turbill's Case, 1 Wms. Saunds. 67; Banks *v.* Self, 5 Taunt. 234; Crosby *v.* Hetherington, 4 M. & G. 933; Magrath *v.* Hardy, 5 Bing. N. C. 782.

as though he knew that the debtor would be notified only by publication. He should not depend upon the curing of defects by the appearance and pleading of the debtor. He should bring himself fully within the statutory requirements as to the affidavit and the bond. He should bear in mind that the object of the suit is to obtain a *final* judgment under which the attached property may be unqualifiedly sold, and to which the purchaser may obtain a defensible title.

The writ, though not unusually issued by the clerk, is an emanation from the court. The attachment being issued as a matter of course upon the compliance by the applicant with all legal requirements, may as well be granted by the court through the clerk as to be done through the agency of the judge's own right hand. No judicial deliberation is called into operation, and the act is done by the clerk for the judge under the general provision found in the statute, and a presumed general order, as though under a special order from the court in the particular case.

Is the issuance of the writ, then, a judicial act when done by the clerk? It is said to be a ministerial act, but it is not therefore any the less judicial. The judge acts through the minister; the latter is his right hand. Wide is the difference between such a minister and an executive officer of the court. The former is the servant of the court: the latter is the servant of the county or district of which he is an officer. A judge may make a clerk amend his minutes or any form of judgment drawn by the latter, but he cannot make a marshal, sheriff or constable amend his return. The marshal is an officer of the United States, in his district; the sheriff is an officer of the State and county; the constable is an officer within his geographical limits, but the clerk is an officer of the court, minister of the court, a doer of ministerial acts for the court, a performer of certain judicial functions under the actual or presumed direction of the judge so as to make his ministerial act the judge's act.

The clerk could not legally make and deliver a writ of attachment, though the statute may contemplate the making and

delivering by him in his ministerial capacity, were the bench without a judge. During the time of the vacancy of the judgship, no attachment could be legally issued. The awarding of process is presumably done always by the judge. It is as much a judicial function as the rendering of a decision. A judge may decide a cause and then have his minister write out the judgment. He may make a general order that when an affidavit and bond are presented to the clerk, the latter shall issue process thereon; or the statute, (as is usual,) may supply the place of such standing order.

Where there is statutory authorization for the clerk to issue the process, as is generally the case, he still is presumed to act under the authority of the court; and it would seem that a different construction would be equivalent to holding that judicial powers may be directly conferred upon the clerk. In all cases in which the clerk validly issues process, he ought to be considered as acting for the judge, as his minister:[1] but the doctrine that the issues of attachments by clerks are judicial acts is not always recognized by the courts.

Whether manipulated by the clerk or the judge in its issuance, the writ is a judicial emanation. It is a step by the court in the exercise of jurisdiction. It is an exercise of jurisdiction by the court whether issued directly by the judge, or by his ministerial officer under his presumed direction when he may be utterly ignorant of the application of the plaintiff for the attachment.

When the clerk is unauthorized by law thus to represent the judge, the latter can give him no general authority to issue attachments; and the issuance of the writ by the former under such circumstances would not be an exercise of jurisdiction.[2] The usual statute provision for issue by the clerk renders it unnecessary for the judge to direct him in each particular case. When an order of court is required to authorize the clerk to

[1] Van Vechten *v.* Paddock, 12 Johns. 178.

[2] Greenvault *v.* F. & M. Bank, 2 Doug. (Mich.) 498; Morrison *v.* Lovejoy, 6 Minn. 183; Guerin *v.* Hunt, 8 Minn. 477; Lewis *v.* Dubose, 29 Ala. 219, Goldsmith *v.* Stetson, 39 Ala. 183.

issue the writ, attachment is void if the writ is issued by him without such order.[1]

Sometimes the affidavit is made in one county, and the writ is issued in another;[2] and if the bond may be executed out of the jurisdiction, still the clerk cannot respond to the application for the writ unless the statute of the State, with reference to both the affidavit and the bond, has been obeyed, whatever its requirement.

The form and requisites of the writ vary under the different State systems, but it should always show the title of the cause, the parties to the suit, the court whence it emanates, the amount of the demand, the officer entrusted with its execution, the time within which it must be returned, and whatever else its statute-authorization may require. It should show *prima facie* the authority of the officer to execute it; and therefore it is essential that it bear evidence of its coming from the court to the executive officer. No one is bound to recognize a sheriff or a marshal or any other functionary's right to levy an attachment, merely because of his official character, though that creates a presumption of authority;[3] but all must respect it when the special authorization is exhibited. The officer himself would be unprotected should the writ be without the authority of a court having jurisdiction to issue it. If it is void, he could make a levy thereunder only at his peril.

When not only the amount but the nature of the claim, and even specifications, must appear in the writ or by an appendage thereto, the omission of such matter would be fatal.[4] The time of the return is important since it shows the limit of the officer's authority with respect to time; and within that limit, he may make a return showing a levy on any legal day.

The writ directs the preliminary seizure of property of the defendant, in quantity enough to satisfy the plaintiff's demand.

[1] Philpott *v.* Newman, 11 Neb. 299: Held that in a suit against a non-resident for a debt not due, an attachment issued by the clerk, without an order of court, is void.

[2] Wright *v.* Smith, 66 Ala. 545.

[3] Miller *v.* Fay, 40 Wis. 633.

[4] Hanson *v.* Dow. 51 Me. 165, and cases cited therein.

The particular property to be seized is usually pointed out by the plaintiff to the sheriff, in written instructions.

The writ is to be returned, in accordance with its provisions, to the court whence it was issued. This would be implied, if not expressed in the instrument itself. If there is not only time but place of return prescribed in the mandate; and if, in expressing the latter, there should be a mistake as to the court, the error would not be fatal if the circumstances precluded any misunderstanding as to what court the writ is returnable.[1]

If the grounds of the attachment have to be inserted, (which is required in some States,) they should correspond with those in the affidavit;[2] and when the writ is without the specifications required, it is void.[3] If the suit is by a firm, the names of the members should be stated.[4] When the debtor's Christian name appeared on the face of the attachment as fictitious, all proceedings thereunder were held void, and the officer and creditor declared liable for attaching, though the person designated by the fictitious name was the owner of the property seized.[5]

The clerk should deliver the writ to the officer who is to execute it, immediately upon its being completed. He may so deliver it through the agency of the plaintiff, who, should he neglect to give it to the officer, would be the only person injured and would have himself alone to blame. The clerk is therefore safe in handing the writ to the attachment plaintiff. He usually does so; and this is convenient to the latter, (rather his attorney,) who usually has instructions to give as to the property to be seized, its whereabouts, etc., just as when directing an execution.

[1] Talbot *v.* Pierce, 14 B. Monroe, 195.

[2] Misrecital held fatal in Ala.: Woodley *v.* Shirley, Minor, 14. But not in Miss: Lovelady *v.* Harkins, 14 Miss. 412; Clanton *v.* Laird, 12 Id. 568.

[3] In Maine, the amount and character of the claim not being specifically set forth in the writ when it was based on a money count, the omission was held fatal. Saco *v.* Hopkinton, 29 Me. 268; Osgood *v.* Holyoke, 48 Id. 410; Neally *v.* Judkins, Id. 566: Hanson *v.* Dow, 51 Id. 165.

[4] Hirsh *v.* Thurber, 54 Md. 210.

[5] Patrick *v.* Solinger, 9 Daly, (N. Y.) 149

Immediate delivery on the part of the clerk becomes very important when there are rival creditors running a race for preference, and where the law treats such writs by the rule *first come, first served.* There is an exception in case of the delivery of such a writ to the executive officer on a *dies non*—such delivery gaining no advantage by thus anticipating the next judicial day.[1] Attachments, like other civil writs, cannot be issued from the court to the officer on Sunday, unless there is statutory authority therefor; because such act would be contrary to the common law.[2] If the granting and issuing of civil process is a judicial act though done through a ministerial officer, it clearly comes under the common law inhibition with respect to the sabbath. *Dies Dominicus non est juridicus.* Criminal process is exceptional, by statute, in England with regard to specified crimes; and more generally so in the United States: warrants for offenders being issuable on Sundays.

If the issue of an attachment by the clerk is a ministerial act in such sense that it is not judicial, it does not come under the common law inhibition.[3] It is not safe for a practitioner to rely upon the judicial character of the act in the present state of opinion upon this subject. Distinction has been drawn between orders of attachment, some being held judicial and some ministerial; and, though such distinction seems unwarrantable, it has to be respected where the courts recognize it.

[1] Whitney *v.* Butterfield, 13 Cal. 335; Blair *v.* Shew, 24 Kan. 280. In the latter case held that an *alias* order made on Monday will not authorize an attachment if a void levy has been made on Sunday upon the first order.

[2] 3 Bl. Com. 277; Swann *v.* Broome, 3 Burr. 1595.

[3] Johnson *v.* Day, 17 Pick. 106, 109, where it is said: "Another objection is that the writ of attachment * * * was void, the same having been made and delivered to the officer on Sunday. By the common law, all judicial acts done on Sunday are held void * * * but all ministerial acts were valid before St. 29 Car. 2, c. 7, so that *an arrest on civil process* on Sunday was legal. *Mackalley's Case*, 9 *Coke*, 65. If then the case were to be determined by the principles of the common law, the question would be, whether the filling up of a blank writ and delivering it to an officer would be a judicial or a ministerial act." This is an unfair putting of the question; it should be whether the ordering of the attachment is a judicial or a ministerial act. The illustration from 9 Coke is not in point, for *arrest on civil process* is an executive act.

Under statutory regulations, the granting of the order, as well as the execution of it, on Sunday or any *dies non*, is generally illegal, and may be made the ground for dissolving the attachment.[1]

A writ of *fieri facias* or any execution writ is entitled to no favor over an attachment writ, and the clerk should first deliver the one which is first in the order of time.[2] But this rule as to the order of delivery should not prevent the clerk from giving a prepared writ to a second applicant for attachment when the first is not present to receive his.[3] Whether the practice is, in any State, for the clerk to deliver writs to plaintiffs to be by them given to the officer with such instructions as they choose to impart, or for him to deliver them directly to the executive officer, the rule is the same as to the order in which they should be delivered. Any partiality by the clerk resulting in an undue advantage to one creditor over another would render him personally liable to the injured party.

The writ must go into the officer's hands in a perfect state, since it is his warrant for the exercise of the sovereign act of taking a man's property away from him at the law's behest. If not perfect, it cannot be amended in any essential feature after property has been attached pursuant thereto. If the attachment is void for want of authority, no emendation of the warrant can cure what has been unlawfully done. It is of the

[1] Held in Blair *v.* Shaw, 24 Kan. 280, that a levy is void if made on Sunday, and voidable if made on an *alias* order on Monday. Held in Johnson *v.* Day, 17 Pick. 106, and in Tracy *v.* Jenks, 15 Pick. 465, 467, that the writ may be issued on Sunday, after sunset; but in Fifield *v.* Wooster, 21 Vt. 215, held that the writ could not be issued on Saturday evening after sunset—each decision following its governing statute. In Alabama, the writ is held to be irregularly issued, if done on Sunday. Matthews *v.* Ausley, 31 Ala. 20. In general, see Butler *v.* Kelsey, 15 Johns. 177; Delamater *v.* Miller, 1 Cow. 75; Geer *v.* Putnam, 10 Mass. 312; Story *v.* Elliot, 8 Cow. 27; Morgan *v.* Richards, 1 Browne, (Pa.) 171; Butler *v.* Kelsey, 15 Johns. 177; Hoghtaling *v.* Osborn, 15 Johns. 119; Field *v.* Park, 20 Id. 140; Fox *v.* Abel, 2 Ct. 541; Pierce *v.* Atwood, 13 Mass. 324, 347; Cotton *v.* Huey, 4 Ala. 56.

[2] Bradley's Appeal, 89 Pa. St. 514. An attachment writ was put into the sheriff's hands at 2 o'clock, 10 minutes; a *fi fa* at 3 o'clock: the first was preferred, but the preference was modified owing to some agreement with the trustees, *etc.*

[3] Lick *v.* Madden, 36 Cal. 208.

highest importance therefore, not only to the plaintiff's interest but to the officer's protection, that the writ be right before it is acted upon.

There can be no reason why it may not have defects repaired before the levy. Nobody is in court but the plaintiff; nobody can oppose the plaintiff's application to have the writ changed in form and substance so as to accord with the affidavit and petition, and no judge should refuse to correct his own act in issuing a defective mandate.

After the levy, the summoned defendant has an interest to oppose the bettering of a bad writ; the court must let him be heard contradictorily, if the plaintiff should pray for amendment; the court itself is incompetent to make the bad writ good, if it has failed to acquire jurisdiction by reason of nonconformity to law thus far, in any respect.

Even an amendment of the writ, made after the levy with the assent of the defendant, will not retroactively make the writ good in relation to other writs of attachment, all against the same property.[1]

After service, a writ cannot be altered to insert a direction for the summoning of a trustee.[2] The same is true with regard to the summoning of a garnishee. The reason is that if a writ could be so altered after service, the defendant would have no official notification of the fact. He could only have it by the service of a second writ after the summoning of the trustee or garnishee, and that would not be an amendment of the first.

When a writ is amendable between the levy and the judgment, its amendment cannot have such retroactive effect as to make the attachment lien outrank a mortgage given by the defendant before the amendment,[3] unless the modification is of a slight character and not such as is necessary to give validity to the levy. If the defect of the writ is that of using a wrong name, directing the attachment of one man's property when that of another should be seized, the proper course is to withdraw the writ and issue a new one. If amendment is

[1] Danielson *v.* Andrews, 1 Pick. 156; Putnam *v.* Hall, 3 Pick. 445. *See* Atkins *v.* Womeldorf, 53 Iowa, 150.

[2] Brown *v.* Neale, 30 Allen, 74.

[3] Drew *v.* Alfred Bank, 55 Me. 450.

allowed, a new levy would be necessary, even if the property has already been seized as that of the wrong person.[1]

Whether a misnomer may be corrected or not, after the service of the summons and the execution of the writ, depends greatly upon the question whether the correction would impair the rights of the defendant, or co-attachers, or any third persons. The error is not amendable if it cannot be corrected without injuring some party.[2] A misnomer may be disregarded when the sense is apparent.[3] Slight clerical errors, such as the omission of a letter in a name or the insertion of one, or even a wrong date of return, where no one can fail to apprehend the meaning, may be made after the levy.[4]

If a writ, issued out of the proper court after jurisdiction acquired, should bear a wrong seal; if, for instance, it should bear the seal of the Circuit instead of the District court when issued by the latter, it may be amended.[5] Such an error ought to be amendable anywhere, because there can be no doubt as to what court issued the writ, and therefore none that its seal ought to have been impressed upon the mandate; and it injures no one to have such an error of inadvertence corrected when discovered.

If a writ is wrongly directed, the address may be summarily righted by the clerk; though, should it not be righted, yet if the sheriff knows that the order is meant for him, and goes on to make the levy, his action will not be void.[6] Trouble and contention might ensue, should he have in hand a junior writ of attachment against the property of the same defendant, properly directed; but, even in such case, he ought to call the clerk's attention to the error and have it corrected, if he is cognizant of it, or go on and make the levy, knowing that the court's order must be obeyed though the evidence of it be defective. Where there is no rival writ, there would be only the debtor to con-

[1] Gile *v.* Devens, 11 Cush. 59.

[2] Dutton *v.* Simmons, 65 Me. 583; Flood *v.* Randall, 72 Me. 439.

[3] Lovelady *v.* Harkins, 14 Miss. 412.

[4] Wight *v.* Hale, 2 Cush. 486; Wellover *v.* Soule, 30 Mich. 481.

[5] Murdough *v.* McPherrin, 49 Iowa, 479.

[6] Warren *v.* Purtell, 63 Ga. 428.

plain of the emendation, and certainly his complaint, under the circumstances, would be of no avail.[1]

Sec. 3. The Writ—as to Property.

It is a peculiarity of this writ for the seizure of property, that while it has reference only to the defendant's property, it is not directed against any specified thing, though there are exceptional cases. In this respect it is unlike an admiralty warrant which is a mandate for the arrest of the property therein stated; unlike any order of seizure issued to vindicate a pre-existing lien. It is, on the contrary, like an execution which is a command to the executive officer to seize any lawfully seizable property of the defendant against whom judgment has been rendered.

The writ of attachment, issued at the beginning of a suit, is really a preliminary execution dependent for its ultimate efficacy upon the rendering of judgment in favor of the plaintiff. It will be better understood by treating it as such. It has all the characteristics of a writ of execution in the first stage. The plaintiff may point out property to the officer. The officer may require security for indemnity in doubtful cases. The property seized comes into the lawful custody of the officer. Enough should be attached to cover the alleged indebtedness of the defendant, without excessive margin. No greater loss should be imposed on the debtor than is reasonably necessary to do justice to the creditor and satisfy the other demands of the law. Competing attachments usually take rank in chronological order as in executions. The parallel will hold good in many other particulars. When judgment in favor of the attaching creditor has been obtained, his original writ becomes merged in the writ of execution, as his attachment lien in becoming perfected is merged in the judgment lien.

Though directed to no specific property of the defendant, the

[1] In Iowa, the writ may be amended after the levy. Atkins *v.* Womeldorf, 53 Iowa, 150. In Texas, amendments to writs are liberally allowed: Whittenberg *v.* Lloyd, 49 Tex. 633, citing Porter *v.* Miller, 7 Tex. 482; May *v.* Ferrill, 22 Tex. 344; Cartwright *v.* Chabert, 3 Tex. 261

writ must be understood as a mandate confined to the seizure of that which may be lawfully attached; so that, though written in general terms, it would not be applicable to things which are not attachable. Though the term property may include lands as well as goods, yet the writ must be understood in connection with the law of the place, and the officer is bound so to understand it and to act upon it. If land property is seizable, under statute provision, upon failure to find attachable personal property, the writ must be read as conveying such contingent authority. It must not be understood as a warrant for attaching anything exempt from seizure by law. If exempt property, mortgaged chattels in possession of the mortgagee, funds or assets validly assigned, and the like, are directly attached by the officer, under a valid writ empowering him, in general terms, to attach property of the defendant, he cannot shield himself under such writ for his wrongful act. For, as before remarked, the writ is to be understood in relation to the law; to be executed only upon property legally liable, and to be so employed as to subserve the purpose for which the creditor caused the court to issue it. If the law has made an exception in authorizing property to be attached for debt, the general writ must be read as containing such exception. Illustration may be found in the provisions relative to exempt homesteads.

No attachment can be issued against an insolvent national bank; and the question of insolvency has reference to the time of the attachment. Subsequent acquisition of money or assets cannot be considered in determining this question, unless the right to them existed at the time of the attachment in the sense that the bank then had property in them. The payment of large debts in full by the bank after the levy does not exclude the corporation from opposing the attachment as invalid by reason of the insolvency of the bank.[1]

The inhibition extends to such banks when they are about to

[1] Raynor *v.* Pacific National Bank, 93 N. Y. 371; R. S. of U. S. § 5242; Robinson *v.* National Bank of Newberne, 81 N. Y. 385; 37 Am. Rep. 508. Held, in Raynor's case, that § 5242, (cited,) is not repealed by § 4 of Act of July 12, 1883.

become insolvent;[1] but it is inapplicable to solvent national banks, so that if one of them has effects in a State other than that in which it is located, they may be attached in a suit against the bank.[2]

How can the officer know whether or not a national bank is insolvent or about to become so? Ordinarily he cannot know; and, in any case, if he does not, he is not to be held pecuniarily responsible for the want of such knowledge. The writ being directed generally against the property of the defendant, the officer can only do to the best of his knowledge; and if the creditor insists upon the execution of the writ upon property of doubtful liability, he should give an indemnifying bond.

Sec. 4. The Writ Protecting the Officer.

The writ is a complete shield for the sheriff, if it is valid and issued from a court clothed with jurisdiction, and he does his duty thereunder. Whether the plaintiff's claim is just or not; whether, if just, it is properly collectible by the process of of attachment or not; whether, if so collectible, the legal grounds for seizure are duly sustained by subsequent proof or not, the officer is protected by a writ in proper form issued in conformity to statute by rightful authority, so long as he does his duty as an officer under the mandate, and does nothing more.[3] He would be doing something more if he should knowingly seize other property than that of the defendant, or do so without proper inquiry; for the writ is necessarily con-

[1] Nat. S. L. Bank *v.* Mech. Nat. Bank, 89 N. Y. 467.

[2] Robinson *v.* Nat. Bank of Newburne, 81 N. Y. 385; 37 Am. Rep. 508.

[3] Erskine *v.* Hohnbach, 14 Wall. 613; Underwood *v.* Robinson, 106 Mass. 296; Booth *v.* Rees, 26 Ill. 45; Hill *v.* Figley, 25 Ill. 156; State *v.* Foster, 10 Iowa, 435; Walden *v.* Dudley, 49 Mo. 419; Kirksey *v.* Dubose, 19 Ala. 43; Lott *v.* Hubbard, 44 Ala. 593; Fulton *v.* Heaton, 1 Barb. 552; Watson *v.* Watson, 9 Ct. 140; Banta *v.* Reynolds, 3 B. Monroe, 80; Garnet *v.* Wimp, Id. 360; Owens *v.* Starr, 2 Littell, 230; Lovier *v.* Gilpin, 6 Dana, 321; Gore *v.* Mastin, 66 N. C. 371; Ela *v.* Shepard, 32 N. H. 277; Seekins *v.* Goodale, 61 Me. 400; Livingston *v.* Smith, 5 Pet. 90; Bird *v.* Perkins, 33 Mich. 28; Walker *v.* Woods, 15 Cal. 66; Mamlock *v.* White, 20 Id. 598; Stevenson *v.* McLean, 5 Hump. 332; Reams *v.* McNail, 9 Id. 542; Day *v.* Bach, 87 N. Y. 56; Hines *v.* Chambers, 29 Minn. 7.

fined to the defendant's property. When thus outside the sphere of his duty, he cannot claim inviolability because of the writ in his hand.[1]

A valid writ is no protection to the officer if he disturb the lawful possession of a person other than the defendant, or attach property that is not legally attachable.[2] Though the defendant may have been duly served in an attachment proceeding, so that citation has brought the personal suit into being; though the affidavit has been made according to statute and bond given; though the writ has been issued and lodged in the sheriff's, marshal's, or other executive official's hands; and though the plaintiff has given instructions and pointed out attachable property, there is not yet even a hypothetical lien created, and the defendant may sell his effects and third persons may buy, with perfect impunity.[3] To this rule there are exceptions, since, in some of the States, the lien becomes operative as soon as the writ is placed in the sheriff's hands; but generally it is true that even after a perfectly valid writ has been issued, the

[1] Wambold *v.* Vick, 50 Wis. 456; Rothermel *v.* Marr, 98 Pa. St. 285; High *v.* Wilson, 2 Johns. 46; Rinchey *v.* Stryker, 28 N. Y. 45; Marsh *v.* Backus, 16 Barb. 483; Tufts *v.* McClintock, 28 Me. 424; Morse *v.* Hurd, 17 N. H. 246; Damon *v.* Bryant, 2 Pick. 411; Robinson *v.* Mansfield, 13 Pick. 139; Richardson *v.* Hall, 10 Md. 399; Rosenbury *v.* Angell, 6 Mich. 508; Sexey *v.* Adkinson, 34 Cal. 346; Main *v.* Bell, 27 Wis. 517; Heath *v.* Keyes, 35 Wis. 668; Perry *v.* Williams, 39 Wis. 339; Williams *v.* Morgan, 50 Wis. 548; Cook *v.* Hopper, 23 Mich. 511.

[2] Cooper *v.* Newman, 45 N. H. 339; Foss *v.* Stuart, 14 Me. 312; Richards *v.* Daggett, 4 Mass. 534; Gibson *v.* Jenney, 15 Id. 205; Howard *v.* Williams, 2 Pick. 80; Bean *v.* Hubbard, 4 Cush. 85; Lynd *v.* Pickett, 7 Minn. 184; Caldwell *v.* Arnold, 8 Id. 265; Woodbury *v.* Long, 8 Pick. 543; Ford *v.* Dyer, 26 Miss. 243; Meade *v.* Smith, 16 Ct. 346; Sangster *v.* Commonwealth, 17 Grattan, 124; Van Pelt *v.* Littler, 14 Cal. 194; Archer *v.* Noble, 3 Me. 418; Harris *v.* Hanson, 11 Id. 241; State *v.* Moore, 19 Mo. 369; Commonwealth *v.* Stockton, 5 Monroe, 192; People *v.* Schuyler, 4 Com. 173; Gibbs *v.* Chase, 10 Mass. 125; Miller *v.* Baker, 1 Met. 27; Morse *v.* Hurd, 17 N. H. 246; Paxton *v.* Steckel, 2 Pa. State, 93.

[3] Fitch *v.* Waite, 5 Conn. 117; Stockley *v.* Wadman, 1 Houston, (Del.) 350; Tomlinson *v.* Stiles, 4 Dutch. (N. J.) 201; Wallace *v.* Forrest, 2 Harris & McHenry, (Md.) 261; Crowninshield *v.* Strobel, 2 Brev. (S. C.) 80. Even if the defendant has sold after the levy, the sale will hold good against a purchaser at an attachment sale, if the writ was void for any cause. O'Farrell *v.* Heard, 22 Minn. 189.

debtor may convey and deliver his property to a third person by a perfectly *bona fide* transaction, so that the sheriff cannot attach it as the property of the defendant except at his peril.

A valid writ of attachment gives no authority to attach and take possession of property of the defendant which is lawfully in the hands of mortgagees. Such property can be reached only by garnishment. The mortgagee has the prior lien; and that cannot be disturbed, prejudiced or forestalled by attachment lien of later date. The mortgagee is entitled to possession rather than the attaching creditor. If mortgaged chattels may be attached under any peculiar practice, instead of being reached by garnishment, as under the general rule, the officer can detain them only so long as may be necessary to take an inventory of them; he cannot permanently dispossess the mortgagee.[1]

If mortgaged chattels, in the lawful possession of mortgagees, are seized as the property of the mortgagor who is the defendant in the attachment suit in which such seizure is made, it has been held that the officer is liable to the mortgagees as a trespasser, if the writ is invalid; that the writ is invalid if the court issuing it has no jurisdiction; and that there can be no jurisdiction if there is no affidavit made in accordance with statute; and that to be in accordance with statute the affiant must swear that the debt sued upon is due if that is required. It was held that the officer, executing such writ, may be sued in a separate action; and, though he be the marshal of a federal district acting under such a writ issued by a Circuit Court of the United States, he may be sued by the mortgagees in a State court as a trespasser; and he cannot shield himself there by the writ because of facial validity, nor prove in defense that the property, held by the mortgagees, belonged to the defendant in the attachment suit.[2]

On the other hand it has been held that if the attachment writ is valid upon its face and issued by a court of general jurisdiction when the defendant is in court, it will protect the officer

[1] King *v.* Hubbell, 42 Mich. 597.

[2] Matthews *v.* Densmore, 43 Mich. 461.

from any collateral attack upon him as a trespasser for executing it; that though the affidavit may not have been made as required by statute, an attachment thereunder is not void but voidable, made under a writ facially valid issued by such a court; that marshals are court officers, bound to obey the court and to execute whatever writs, apparently legal, may be put into their hands for execution; in fine, that the officer is perfectly protected by such writ and need not look behind it for its authorization.[1]

This conflict of opinion turns upon a question of jurisdiction —which is not now the subject in hand. Both courts doubtless agree that when a judicial command has been authoritatively given, the officer is bound to obey, and therefore is not punishable for obedience. Both would certainly concur in the conclusion that the marshal, in the case they were considering, was under the ample protection of the writ he bore if he attached property owned and possessed by the attachment-defendant, *provided* they could first agree that the U. S. Circuit Court had jurisdiction of the ancillary suit.

Sec. 5. Indemnity Bond.

The officer to whom a valid writ is addressed is bound to use all due diligence to execute it, provided he can do so without perpetrating injustice to others and loss to himself. He is not to be the arbiter of the possible injustice, but he is the best judge as to whether he can execute his trust without involving himself in a law suit for trespass. If he has reasonable ground to believe that the property which the attaching creditor has pointed out for seizure is really the property of another person than the debtor; if he has been credibly so informed, or has been notified of the fact by a claimant; especially if the property is in litigation and the question of ownership is doubtful, he may require a bond of indemnity from the plaintiff.

The attachment is to be effected in the plaintiff's interest— not in that of the officer; he has provoked the proceeding and caused the writ to issue; he has sworn to the defendant's indebtedness and must know the fact; he has pointed out the particu-

[1] Same Case, 109 U. S. 216.

lar property which he wishes the sheriff to attach, and why should he not protect that officer?

The duty which the officer is ordered to perform is a delicate one, in many instances; and it is always a highly responsible one. It involves reparation to the plaintiff in damages for any dereliction by which he fails to attach property and causes the plaintiff loss in consequence. If he does not request the attaching creditor either to indemnify him or to point out property for attachment, he is yet bound to execute the precept with diligence and faithfulness, and is responsible for his own faults resulting in failure.

When a plaintiff, personally or through his attorney, designates what goods or other property the officer must seize, he is bound to protect him in the execution of such instructions, and may be made to indemnify against loss resulting to the officer because of obedience to such instructions. In such case, there is an implied promise of indemnification.[1]

If the sheriff acts on his own responsibility and thus causes loss to himself, the plaintiff who has not given him either bond or instructions would not be obliged to make good his loss.

It is the right of the person charged with the execution of the writ to demand a bond of indemnity before proceeding in doubtful cases.[2] Whether there is express authority therefor by statute or not, the common law gives the right.[3] The case is like that of a seizure under a *fi. fa.* where the right to indemnity is from the common law. Attachment is a preliminary seizure to hold the property till judgment can be obtained and *vend. ex.* or some other writ of sale issued. There is therefore as much reason for indemnity in the latter case as in the former, and the same legal principle applies.[4]

[1] Gower *v.* Emery, 6 Shepley, 79; Ranlett *v.* Blodgett, 17 N. H. 306; Bond *v.* Ward, 7 Mass. 126; Humphreys *v.* Pratt, 2 Dow & Clark, 288; Fletcher *v.* Harcott, Hutton, 55; Betts *v.* Gibbons, 2 Ad. &. El. 57; Adamson *v.* Jarvis, 4 Bing. 72. In Tennessee, held that the sheriff cannot demand a bond of indemnity before levying: Shaw *v.* Holmes, 4 Heisk. 692.

[2] Smith *v.* Cicotte, 11 Mich. 383.

[3] Chamberlain *v.* Beller, 18 N. Y. 118.

[4] In Shriver *v.* Harbaugh, *et al.* 37 Pa. St. 401, it is stated that the sheriff informed the attaching plaintiff that he required a bond of indemnity for

If the officer finds designated property in the possession of another than the debtor, held under a claim of title; or learns that it is in possession of a mortgagee, however doubtful may be the possessor's right to hold, an indemnity bond may reasonably and judiciously be demanded of the plaintiff before the execution of the writ upon such property. And he may, when indemnity has been demanded, delay the execution till the bond be executed, and refuse to act altogether, if it be refused. If indemnity has been promised, there would seem to be an implied agreement that the officer need not seize until protected.[1]

While an officer is not obliged to execute the writ upon property to which the title of the defendant is doubtful, without being reasonably indemnified, he cannot demand a bond of indemnity in a sum more than sufficient to secure him against loss; and he cannot release the property, where it has been rightly attached, without rendering himself liable to the attaching creditor.[2]

A sheriff who has instructions to attach certain property pointed out by the attaching creditor, cannot escape the responsibility of executing the writ on the ground that he has been furnished no indemnity bond, when he has not asked for any.[3] It is his duty to go on and seize, and obey the plaintiff's instructions as far as practicable; and it is not a sufficient excuse for default that he afterwards heard and erroneously believed that such instructions would expose himself to an action, and would have resulted in no good to the plaintiff. But if his subsequently received information should prove true, he might reasonably ask indemnity after first undertaking to act without any express promise, being, in such case, answerable to the plaintiff only for such actual damage as may have been incurred

the reason that the garnishee had given notice that the goods in his possession were claimed by another man than the defendant. The plaintiff refused to give the bond, and the sheriff notified the garnishee that he had no claim on the goods. It was held that the sheriff was not liable for discharging the garnishee, as his bailee, when the indemnity had been refused. See Rothermel *v.* Marr, 98 Pa. St. 285.

[1] Smith *v.* Cicotte, 11 Mich. 386.

[2] Wadsworth & Co. *v.* Walliker, 51 Iowa, 605.

[3] Perkins *v.* Pitman, *et al.* 34 N. H. 261.

by the latter by reason of the delay. The sheriff, having undertaken to attach specified property, is liable for not doing so, unless he can show that he could not lawfully follow the creditor's instructions. To admit the excuse that he was deterred by subsequent information, etc., would be dangerous and contrary to authority.[1]

But if a third person has made a contest and claims property as his, after it has been attached on *mesne* process as that of the defendant in an attachment suit, the sheriff may demand indemnity before proceeding further. If there are several creditors, some of whom indemnify the officer when requested while others do not, the former will be the beneficiaries of his action rather than the latter.[2]

When the officer has been furnished with an indemnifying bond, he must yet comply with all of his own obligations before he can avail himself of the security it gives. If property has a rival claimant though to be attached as belonging to the defendant, and the bond given to indemnify the sheriff contains the stipulation that he should inform the attaching creditor in case of any suit, he cannot maintain any action on the bond for loss that might have been prevented had he complied with the condition. Nor could he recover of the creditor upon an implied promise, inferred from the instructions to attach designated property, for the reason that the stipulation would preclude such an implication.[3]

Notwithstanding the indemnity bond, the plaintiff is not entitled to an order on the sheriff to pay money into court, when there is a suit, by a claimant of the fund, still pending, if by the terms of the bond or other agreement the sheriff had permission to retain the money for a reasonable time as additional security.[4]

[1] Ranlett *v.* Blodgett, 17 N. H. 304; Ball *v.* Badger, 6 N. H. 405; Marshall *v.* Hosmer, 4 Mass. 63.

[2] Smith *v.* Osgood *et al.* 46 N. H. 178: having reference to sale, and the rights of creditors to proceeds, etc.

[3] Preston *v.* Yates, 24 Hun. 534.

[4] Scherr *v.* Little, 60 Cal. 614.

CHAPTER V.

ATTACHING.

§ 1. What is Attachable.
2. Property Held by Third Persons.
3. Property Consigned.
4. Exemption.
§ 5. Choses in Action.
6. Method of Seizing.
7. Time of Seizing.
8. Wrongful Levy.

Sec. 1. What is Attachable.

The sheriff, armed with the writ, and commanded to attach something belonging to the defendant which is capable of bearing a lien and susceptible of becoming the *res* against which the attachment proceeding is directed, must now select what he is to take into his possession. He is obliged to make selection when the defendant possesses and owns more property than is sufficient to constitute the *res* of the suit, unless the writ is directed against specific property, when he can seize only that. The command of the court, in the latter case, is for the attachment of the particular thing which is described in the affidavit and the writ: so he has no choice between that and other property when about to execute the attachment.[1] Ordinarily the command is general as to the defendant's property, and the sheriff has no guide in making his selection, except that afforded by the law and the instructions of the plaintiff. He should regard the directions of the plaintiff when they are within the law, especially if he has been secured by an indemnifying bond. He is not, however, legally bound to do so, when the instructions are obviously unreasonable, evidently intended to harass the defendant and likely to result in a damage suit against the officer, if there is sufficient other property liable to the attachment which may be readily secured without any embarrassing

[1] Reid *v.* Tucker, 56 Ga. 278.

results. Though protected from damage by the bond of indemnity, the sheriff is not, under such circumstances, obliged to subject himself to the annoyances of personal litigation.

It is not generally deemed the duty of the attachment defendant to point out property to be attached, or to give the names of his debtors that they may be garnished.[1] It is rather a privilege than a duty, when property is about to be seized in execution of a judgment, for the debtor to be allowed to designate what property he would prefer to have taken under the writ. It is his duty to pay his debts, and to satisfy the judgment against him, and to facilitate the officer; but when there is no judgment, and presumably no indebtedness, (since he has put or may put the charge at issue,) there is no reason for his pointing out property to be attached, or pointing out his own debtors to be garnished.

There is great uniformity in the statutes as to what is attachable. The real and personal property of the defendant is liable in every State and Territory. His credits are everywhere attachable; and many of the statutes expressly enumerate among liable property, his stocks held in incorporated companies, legacies, interests in decedents' estates and dividends in the funds of insolvent estates; while some declare that evidences of debts due him in the form of notes and bonds and book accounts, etc., are liable to attachment. Those statutes which do not expressly mention stocks and like incorporeal property, generally include them in comprehensive provisions, such as authorize the attachment of all species of property, real or personal.

Notes, bonds, etc., however, cannot be deemed as comprehended in a general authorization for the attachment of all

[1] In Connecticut, it is deemed fraud on the part of the debtor who refuses to disclose such facts, giving rise to action on the case and attachment of his body. Feary *v.* Hotchkiss, 46 Ct. 266. If the defendant discloses the names of his debtors and the amounts due, the plaintiff's process against them as garnishees is called a factorizing process, and the attachment is called a foreign attachment, whether the defendant is within the State or a non-resident. If a corporation does business in one town and is located in another, process of foreign attachment may be served upon it by leaving a copy with any of its agents or clerks in the town where it does business. Adams *v.* Willimantic Linen Co. 46 Ct. 320.

property, since evidences of debt are not property, and therefore cannot constitute the *res* of the ancillary proceeding in an attachment suit. The seizure of a promissory note, without the garnishment of the obligor and the attachment of the credit in his hands, would bring into the sheriff's possession nothing that could be made the basis of the attachment lien. Those statutes which authorize such a seizure scarcely mar the general uniformity above mentioned; for, with the evidence of a credit due the defendant taken into the officer's hands, there must yet be procedure to reach the third person holding the credit: and all the States allow this by means of garnishment or the trustee process.

What the debtor owns may be either in his own possession or in the hands of third persons. It is essential to direct-attachment that the property should be both owned and possessed by the debtor. His legal dispossession by the sheriff, so that the latter, under the court, gains the control of the property, is necessary to its valid attachment; and therefore the debtor must first have the custody in the capacity of owner in order that such dispossession may be legally effected.

Attachment of property owned by the defendant but held by others, and of credits due him from others, is effected by means of garnishment, which will be hereafter treated.

Property in the possession of the debtor cannot be attached as his if he does not own it.[1] What he holds in trust as guardian, executor, administrator, agent or in any official, financial or other capacity cannot be attached and executed for his debts.

If he has set apart any of his own property or funds to pay a particular debt, the general attachability of that which is thus devoted depends upon the question whether he retains control over it. If it has been put into the hands of a third person for the use of a particular creditor, beyond power of revocation, no other creditor can attach it unless it exceeds the amount necessary to effect the purpose of the deposit; for the beneficiary would have a lien upon it to that amount. At any rate, it could only be attached in the hands of the depositary subject to the

[1] But see Shannon *v.* Blum, 60 Miss. 828.

lien. It has been held that funds set apart to pay a particular debt falling due, in the hands of an agent for that purpose, under such circumstances as to constitute a trust fund beyond the control of the principal, are not attachable for his debts, though his creditors have had no notice of such trust.[1] This disposition of a fund is distinguishable from that of its deposit with a clerk of court as security in place of an undertaking bond. In the latter case, the fund remains the property of the defendant without any certainty that any part of it will have to be used to make good his obligation; and the fund is liable to attachment,[2] subject to the lien upon it.

These illustrations belong rather to the subject of attachment in the hands of third persons than to direct attachment which is now under consideration. They are mentioned here to show that the debtor must have both ownership and control in order to render property attachable. Even were he to retain an article of property in his own hands, yet create a lien upon it in favor of a particular creditor, (unless insolvent and granting the lien by way of giving fraudulent preference to such creditor,) such article could not be attached by any other creditor to the prejudice of the lien. It could only be taken subject to the lien.[3]

What has been said respecting the joinder of ownership and possession must be qualified so far as fraudulent transfers are concerned. The simulated sale of land or other property, though accompanied by delivery, would not prevent its lawful attachment as the property of the fraudulent grantor. Even though he should die before the debt against him should become due, an attachment suit to enforce it might be brought, on proper grounds, against his administrator or other legal representative of his estate, and the fraudulently transferred prop-

[1] R. L. & M. Works *v.* Kelley, 88 N. Y. 234.

[2] Dunlop *v.* Pat. F. Ins. Co. 74 N. Y. 145.

[3] Goulding *v.* Hair, 133 Mass. 78: There are two modes in Massachusetts: (1.) The creditor may attach mortgaged property still in the hands of the mortgagor, if he pays the mortgagee in ten days; or, he may attach and summon the mortgagee as trustee. Flanagan *v.* Cutler, 121 Mass. 96; Boynton *v.* Warren, 99 Id. 172; Hayward *v.* George, 13 Allen, 66; Martin *v.* Bayley, 1 Id. 381.

erty might be attached, though the grantee might be in possession.[1] The reason is that the debtor would not cease to own by reason of his wrongful act; nor would his right of possession be lost, so far as interested third persons are concerned.

Ownership and legal possession by the defendant are the requisites. If some third person has the legal and actual possession, the property can only be reached by the process of garnishment.

Assignment must be valid as to the attaching creditor to preclude him from seizing property as that of the assignor. Land transferred in a State other than that in which it is situated would be validly transferred as to one who has assented to it by taking a part of the price.[2]

All that is attachable as the right, title and interest of a member in a firm, is his share of the surplus after the debts of the partnership are paid.[3] If the firm is insolvent, nothing is attached by attaching the interest of a member; and a purchaser of the interest of such member, at a sheriff's sale, would get nothing. One partner can legally sell partnership goods to a customer, in his line of trade, or convey them to a creditor of the firm in payment, without consulting the other partner or partners, even when the firm is insolvent, and though preference be thus given to one creditor over another, (where there is no statutory inhibition of such a preference;)—but his creditor cannot successfully attach as his anything more than his share of the assets remaining after the payment of the debts of the firm, as above stated.

It is trespass to attach and remove partnership goods on mesne process against one partner for his personal debt,—it is held, but this is not the case everywhere.[4]

[1] Pulsifer *v.* Waterman, 73 Me. 233.

[2] Chafee *v.* Fourth National Bank, 71 Me. 514. A general assignment by a debtor whose debts do not exceed $300, does not dissolve an attachment in Maine: Collins *v.* Chase, 71 Me. 434; Insolvent Act of 1878, § 59.

[3] Staats *v.* Bristow, 73 N. Y. 264; Peck *v.* Fisher, 7 Cush. 386; McHenry *v.* Cawthorn, 4 Heisk. (Tenn.) 508.

[4] Sanborn *v.* Royce, 132 Mass. 594. The court say that the question before them had never been decided in Mass., though subjected to much discussion and conflicting opinion else-

The non-residence of a co-debtor is no ground for attaching the resident debtor's property;[1] nor that of a co-contractor for attaching both contractors' property;[2] but the residence of one contractor within the State will not shield the property or interests of his co-contractor, living out of the State, from attachment.[3]

Whether partnership effects are attachable in a suit against one member of the firm, who is a non-resident, upon a debt contracted by the partnership, depends upon the character of the obligation: whether it is joint or joint and several. If the obligation sued upon is joint, partnership effects are not attachable in such suit;[4] but if it is joint and several, the rule is otherwise.[5] It is joint by the law of partnership without statutory modification: so all the partners must be sued in order to attach property of the firm.

In a suit against two joint-debtors, attachment will hold only when the affidavit is sufficient against both.[6] It has been held that if both are residing out of the State, and the creditor finds property of one of them within the State, he may attach it as that of a non-resident debtor without mentioning the co-obligor.[7]

Though a partnership may have been domiciliated in a State, and there liable to be sued on ordinary process, yet, upon its dissolution, its assets may be attached for a debt of the firm, if

where. And they cite the following authorities, in support, as "more in accordance with just legal principles" than those which are opposed to their proposition: Bank *v.* Carrollton R. R. 11 Wall. 624–8–9; Cropper *v.* Coburn, 2 Curtis, 465; Burnell *v.* Hunt, 5 Jur. 650; Garvin *v.* Paul, 47 N. H. 158; Darborrow's Appeal, 84 Pa. St. 404; Haynes *v.* Knowles, 36 Mich. 407; Levy *v.* Cowan, 27 La. Ann. 556; *Post*, pp. 524–5.

[1] Mills *v.* Brown, 2 Met. (Ky.) 404; Duncan *v.* Headley, 4 Bush. 45.

[2] Taylor *v.* McDonald, 4 Ohio, 149.

[3] Jefferson County *v.* Swain, 5 Kan. 376.

[4] Wiley *v.* Sledge, 8 Ga. 532; Wallace *v.* Galloway, 5 Coldw. (Tenn.) 510; Barber *v.* Robeson, 15 N. J. L.

[5] Green *v.* Pyne, 1 Ala. 235; Conklin *v.* Harris, 5 Id. 213. See Chipman's case, 14 Johns. (N. Y.) 217; Smith's case, 16 Id. 102; Mersereau *v.* Norton, 15 Id. 179; Robbins *v.* Cooper, 6 Johns. Ch. 186; Mills *v.* Brown, 2 Met. (Ky.) 404.

[6] Hamilton *v.* Knight, 1 Blackf. 25; Bartle *v.* Coleman, 6 Wheat. 475.

[7] Dobbs *v.* The Justices, 17 Ga. 624.

those lately composing it are non-residents, provided they are still the owners of the assets.[1]

If one partner resides in the State, the non-residence of his co-partner is no ground for an attachment bill in chancery against both partners and against the effects of both.[2] If one partner has absconded, attachment would hold against his interest only.[3] If all the partners of a firm have absconded, attachment lies against the property of the firm.[4]

In a suit against an insolvent firm, the interest therein of an absconding partner was attached; and the attachment was attacked on the ground that the absconding partner had no attachable interest. The court refused to vacate the attachment on that ground.[5] Of course the defendant had no cause to attack the proceeding if nothing of his had been molested.

A debtor's property is none the less liable for his debts by reason of its being a part of something held in common. If the thing so held is indivisible, the part owned by the defendant may be levied upon as an undivided interest. If it is divisible, the officer would be obliged so to make the levy, unless the defendant and the other owners in common should consent to a separation of the seizable portion. Though partnerships, particularly commercial partnerships, are governed by usages peculiar to themselves, in some respects, with regard to the attachment of a partner's interest in a firm, the interest of the defendant in property held in common may readily be reached by an officer in executing a writ of attachment.[6]

In making the levy on the defendant's part of intermingled property, it may be necessary to take and detain the whole for a reasonable time. The inconvenience and even loss that may thus occur to the joint owners with the defendant are incident to the

[1] Lobdell *v.* Bushnell, 24 La. Ann. 295. In Indiana it was held that when the suit is against a partnership composed of non-residents, their property is attachable: Voorhies *v.* Hoagland, 6 Blackf. 232.

[2] Wallace *v.* Galloway, 5 Coldw. (Tenn.) 510.

[3] Bogart *v.* Dart, 25 Hun. 395.

[4] Leach *v.* Cook, 10 Vt. 239.

[5] Buckingham *v.* Swezey, 25 Hun. 84.

[6] Carter *v.* Jarvis, 9 Johns. 143; Gall *v.* Hinton, 7 Abb. Pr. 120; Walker *v.* Fitts, 24 Pick. 191; Buddington *v.* Stewart, 14 Ct. 404; Marion *v.* Faxon, 20 Id. 486.

attachment, and ordinarily neither the officer nor the attaching creditor is pecuniarily responsible therefor.[1] If mortgaged chattels are attachable, the attachment must be laid in the hands of the mortgagees; yet the officer may take and temporarily detain them for the purpose of making an inventory.[2] The attachment is subject to the lien, yet the mortgagees retain the property for the sheriff.

Whether a married woman's property may be attached, depends upon the character in which she holds it. If she is doing business as a sole trader, her property is liable for the debts which she contracts. When she does business on her separate account, and her property has been legally set apart from that of her husband, and this separation of business and property is made known to the public by public records, that which belongs to her or is earned by her, ought not to be liable to attachment or execution for her husband's debts. But, being a married woman, she is presumed to be doing business under her husband's direction, and what she has and what she makes is presumably liable for the husband's debts, unless she has statute protection or the presumption is removed in some legal way.[3]

When both husband and wife are non-residents, and the action is against both, attachment may lie.[4] And because her *status* as to place is governed by that of her husband, she is

[1] Reed *v.* Howard, 2 Met. 36; King *v.* Hubbell, 42 Mich. 597; Sibley *v.* Fernie, 22 La. Ann. 163; Lawrence *v.* Burnham, 4 Nev. 361; Remington *v.* Cady, 10 Ct. 44. See Melville *v.* Brown, 15 Mass. 82.

[2] King *v.* Hubbell, 42 Mich. 597.

[3] In Massachusetts, a married woman, doing business on her own account, must file a certificate of the fact with the town clerk, in order to avail herself of the statute there, which exempts the property of such from liability for the husband's debts. Act of 1862, c. 198, § 1. Chapman *v.* Briggs, 11 Allen, 546. Held applicable to personal property only: Bancroft *v.* Curtis, 108 Mass. 47. Carrying on separate business, includes farming as well as trading: Snow *v.* Sheldon, 126 Mass. 332; Chapman *v.* Foster, 6 Allen, 136; Feran *v.* Rudolphsen, 106 Mass. 471. *See* Proper *v.* Cobb, 104 Mass. 589. It includes keeping a boarding house; and debts due to her for board may be attached by her husband's creditors, if she has not filed the certificate: Harnden *v.* Gould, 126 Mass. 411; Dawes *v.* Rodier, 125 Mass. 421. Insurance policy in favor of wife: Troy *v.* Sargeant, 132 Mass. 408.

[4] In Alabama, under the Act of 1846, to subject the wife's separate estate to the satisfaction of a debt contracted by her before marriage,

deemed to reside in the State of his residence, and her property is amenable to attachment as that of a non-resident when the suit is against both her and him, though she may actually live in the State where the suit is instituted and the attachment sued out.[1]

Sec. 2. Property Held by Third Persons.

Property of the defendant, lawfully in the possession of third persons, though it may be subject to garnishment, cannot be actually seized by the sheriff under a writ of attachment, and taken from such persons. Under statute authorization, some such property may be temporarily taken for the purpose of making an inventory, or of separating it from other attachable things which the third possessor does not claim to hold, but there can be no detention of such property to await the judgment in the attachment suit. And whatever is lawfully in the possession of a lien-holder cannot be attached unless the lien be first removed by payment or otherwise.[2]

The attaching creditor cannot dispossess third persons of their possession for the same reason that the debtor cannot; he acquires no greater right to take property under his writ,

though the estate was secured to her by ante-nuptial contract. Crocker *v.* Clements, 23 Ala. 296.

[1] Baldwin *v.* Flagg, 43 N. J. L. 495; Hackettstown Bank *v.* Mitchell, 28 N. J. L. 516; Hunt *v.* Hunt, 72 N. Y. 217; Greene *v.* Greene, 11 Pick. 410; Ross *v.* Edwards, 52 Ga. 24: Held that attachment does not lie against a lunatic and his committee, though non-residents.

[2] Williams *v.* Morgan, 50 Wis. 548; Perry *v.* Williams, 39 Wis. 339; McNeill *v.* Glass, 1 Martin. N. S. (La.) 261; Skillman *v.* Bethany, 2 *Id.* 104; Lambeth *v.* Turnbull, 5 Rob. (La.) 264; Carpenter *v.* Dresser, 72 Me. 377; Brownwell *v.* Carnley, 3 Duer, 9; Stearns *v.* Dean, 129 Mass. 139; Schepler *v.* Garriscan, 2 Bay, 224; Mitchell *v.* Byrne, 6 Rich. 171; Thompson *v.* Rose, 16 Ct. 71; De Wolf *v.* Dearborn, 4 Pick. 466; Rodega *v.* Perkerson, 60 Ga. 516; Wolfe *v.* Crawford, 54 Miss. 514; Townsend *v.* Newell, 14 Pick. 332; Robinson *v.* Mansfield, 13 Pick. 139; Picquet *v.* Swan, 4 Mason, 443; Haven *v.* Low, 2 N. H. 13; Morse *v.* Hurd, 17 N. H. 246; Badlam *v.* Tucker, 1 Pick. 389; Sargent *v.* Carr, 12 Me. 396; Henry *v.* Quackenbush, 48 Mich. 415; Lyle *v.* Barker, 5 Bin. 457; Moore *v.* Murdock, 26 Cal. 514; Rix & Stafford *v.* Silknitter, 57 Iowa, 265; Seymour *v.* Newton, 105 Mass. 272; Inslee *v.* Lane, 57 N. H. 454.

through the officer, than the defendant has in his personal capacity.[1]

If there is a question whether the ownership and rightful possession is in the vendor or vendee, the attaching creditor's right to seize and take possession depends, of course, upon the settlement of that question in any given case. If the vendor is his debtor against whom he proceeds in an attachment suit, the property sold cannot be attached after actual or constructive delivery to the vendee. If the vendee is the debtor of the attaching creditor, the property sold cannot be attached in a suit against that debtor unless he has acquired ownership with the right of possession. Goods *in transitu* afford illustrations of such questions: the attachability of property always turning upon the right of possession on the part of the debtor in the attachment suit.[2] Even if there has been delivery of property to the vendee, or agreement to sell when there has been no delivery, it is not attachable as his while some condition stands unperformed, the doing of which is essential to his title.[3]

Property not owned but held by a tenant, lessee or mere borrower cannot be attached under a writ directed against the property of the person thus temporarily having possession.[4] This is too plain for comment; but the facts proved in suits with respect to peculiar contracts between landlords and tenants, lenders and borrowers, etc., are often complicated, and of such character as to throw the real ownership into doubt. One cannot anticipate such complications so as to subject them to any more definite rule than that broadly given in the first sentence of this paragraph. And it would hardly be profitable to collate cases in which, upon different states of facts, the possessing

[1] Rix & Stafford *v.* Silknitter, 57 Iowa, 265; Stephenson *v.* Walden, 24 Iowa, 84; Oliver *v.* Lake, 3 La. Ann. 78; Houghton *v.* Davenport, 74 Me. 590.

[2] Wolfe *v.* Crawford, 54 Miss. 514; Scofield *v.* Bell, 14 Mass. 40; Meldrum *v.* Snow, 9 Pick. 441; Hatch *v.* Bailey, 12 Cush. 27; Hatch *v.* Lincoln, Id. 31.

[3] Robinson *v.* Mansfield, 13 Pick. 139; Townsend *v.* Newell, 14 Id. 332; McFarland *v.* Farmer, 42 N. H, 386; Buckmaster *v.* Smith, 22 Vt. 203; Woodbury *v.* Long, 8 Pick. 543.

[4] Morgan *v.* Ide, 8 Cush. 420; Chandler *v.* Thurston, 10 Pick. 205; Lewis *v.* Lyman, 22 Pick. 437; Coe *v.* Wilson, 46 Me. 314.

lessee or borrower has been held to have an attachable interest or has been held to have none.

Trust property is not liable to attachment for the debt of the trustee, though it be recorded in his name.[1]

The rule that third persons, lawfully possessing, cannot be disturbed, extends to officers who hold property in an official capacity; to sheriffs and marshals who hold upon attachments already executed, or under other seizure; to all whose possession is such that the property held is in the custody of the law.[2] Though he cannot disturb the possession already acquired, an officer may levy on goods in the custody of another officer who must endorse the second attachment on the first.[3]

When property, in the custody of the law, has been reduced to money, or when money is in such custody however it may have reached the possession of the lawful official custodian, it is not attachable.[4]

Sec. 3. Property Consigned.

Goods sold but not paid for, consigned by the vendor to the vendee, are not attachable as the property of a consignee before

[1] Houghton *v.* Davenport, 74 Me. 590.

[2] Paradise *v.* Farmers' and Merchants' Bank, 5 La. Ann. 710; Walker *v.* Foxcroft, 2 Me. 270; Strout *v.* Bradbury, 5 Id. 313; Odiorne *v.* Colley, 2 N. H. 66; Moore *v.* Graves, 3 Id. 408; Lathrop *v.* Blake, 3 Fos. 46; Burroughs *v.* Wright, 16 Vt. 619; West River Bank *v.* Gorham, 38 Vt. 649; Watson *v.* Todd, 5 Mass. 271; Vinton *v.* Bradford, 13 Id. 114; Thompson *v.* Marsh, 14 Id. 269: Burlingame *v.* Bell, 16 Id. 318; Robinson *v.* Ensign, 6 Gray, 300; Benson *v.* Berry, 55 Barb. 620; Read *v.* Sprague, 34 Ala. 101; Harbinson *v.* McCartney, 1 Grant, 172; Wendell *v.* Pierce, 13 N. H. 502; Beers *v.* Place, 36 Ct. 578; Roberts *v.* Dunn, 71 Ill. 46; Voorhies *v.* Sessions, 34 Mich. 99, and many other cases cited in Ch. VI, § 5.

[3] White *v.* Culter, 12 Ill. App. 38; Acts of 1874, Ch. 77, § 51.

[4] Pierce *v.* Carleton, 12 Ill, 364; Dawson *v.* Holcomb, 1 Ohio, 275; First *v.* Miller, 4 Bibb. 311; Reddick *v.* Smith, 4 Ill. 451; Thompson *v.* Brown, 17 Pick. 462; Clymer *v.* Willis, 3 Cal. 363; Turner *v.* Fendall, 1 Cr. 117; Crane *v.* Freeze, 1 Har. 365; Prentiss *v.* Bliss, 4 Vt. 513; Jones *v.* Jones, 1 Bland, 443; Dubois *v.* Dubois, 6 Cow. 494; Burrell *v.* Letson, 1 Strobhart, 239; Conant *v.* Bicknell, 1 D. Chipman, 50; Farmers' Bank *v.* Beaston, 7 Gill & J. 421; Blair *v.* Cantey, 2 Speers, 34; McKinney *v.* Purcell, 28 Kan. 446.

either actual or constructive delivery. The right of stoppage *in transitu*, before the goods come into the possession of a purchaser who has become bankrupt, or embarrassed in business, remains in the vendor after the consignment. It is not necessary to the existence of this right that the vendee should have made a surrender in court as an insolvent; it is sufficient if he is unable to pay his debts. The consignor may countermand delivery and resume possession for the reason that the other contracting party is unable to perform, and he would be bereft of both the goods and their price were he not allowed to regain the former.

Though the carrier's possession is ordinarily that of the consignee, yet it is not actual custody by the latter, and it does not take away the consignor's right of stoppage *in transitu*. Though the case would be different were the goods shipped in payment to the consignee, so that the consignor could have no further claim upon them, yet, in the case above suggested, the goods are not attachable as the property of the consignee before delivery to him by the carrier, and trover will lie against an attaching officer as a trespasser who seizes them as such.[1]

Though there may be no difficulty about payment upon delivery, yet if, by the terms of the contract, goods must be weighed, measured, selected, etc., before delivery, the sale is not complete before the preliminaries are observed; and, until delivery, they are, of course, attachable as the property of the vendor and not as that of the vendee.[2] If, however, the contract is complete, and the goods are in process of delivery by the vendor as agent of the vendee, and the ownership has really changed from the former to the latter, they are not attachable as the property of the vendor.[3] When the property sold is not actually

[1] Inslee *v.* Lane, 57 N. H. 454, and cases therein cited.

[2] Smart *v.* Batchelder, 57 N. H. 141; Prescott *v.* Locke, 51 Id. 94; Jenness *v.* Wendell, 51 Id. 63; Messner *v.* Woodman, 22 Id. 172; Warren *v.* Buckminster, 24 Id. 336; Foster *v.* Ropes, 111 Mass. 10; Riddle *v.* Varnum 20 Pick. 280; Rugg *v.* Minett, 11 East. 210; Wallace *v.* Breeds, 13 East. 522.

[3] Hobbs *v.* Carr, 127 Mass. 532; Leonard *v.* Davis, 1 Black, 476; Macomber *v.* Parker, 13 Pick. 175; Legg *v.* Willard, 17 Id. 140; Riddle *v.* Varnum, 20 Id. 280; Stinson *v.* Clark, 6 Allen, 340; Ingalls *v.* Herrick, 108 Mass. 351. What will con-

delivered, but a bill of sale is given to the purchaser for a valid consideration, the title does not thus pass so as to prevent the attachment of the property in a suit against the seller.[1] The sale would be good between the contracting parties; but, without delivery, it is not so as against an attaching creditor of the vendor. If, under such circumstances, the purchaser should perform some act of ownership, or the seller should agree to keep the property for the purchaser, as his agent, the transfer would be complete.[2] If the property sold is in the custody of a third person, and notice of the sale is given to him, and he continues the custody as the agent of the purchaser, the transfer would be complete.[3]

The vendee who has had goods delivered to him which he has bought in good faith but has not paid for, will be presumed the owner, so that an attaching creditor may seize them; and should the vendors attempt to regain them, they must allege and prove fraud on the part of the purchaser.[4] But they cannot attach and yet claim to own the goods. Even if the purchaser has bought them with the intention of not paying for them but making an assignment thereof in favor of preferred creditors who are not the vendors, the latter cannot attach the goods as the property of the purchaser, and, at the same time, set up that the sale was void because of fraud. They could disclaim the sale and recover the goods; but they could not employ both remedies.[5]

The consignor who ships goods to his creditor in payment, parts with his ownership when he delivers them to the carrier: the possession by the the latter is that of the consignee, and the

stitute a symbolic delivery so as to perfect the title of the vendee and render it good against an attachment in a suit against the vendor: Russell *v.* O'Brien, 127 Mass. 349.

[1] Dempsey *v.* Gardner, 127 Mass. 381; Carter *v.* Willard, 19 Pick. 1; Shumway *v.* Rutter, 7 Pick. 56; Packard *v.* Wood, 4 Gray, 307; Rourke *v* Bullens, 8 Id. 549; Veazie *v.* Somerby, 5 Allen, 280.

[2] Ingalls *v.* Herrick, 108 Mass. 351; Chapman *v.* Searle, 3 Pick. 38.

[3] Tuxworth *v.* Moore, 9 Pick. 347; Bullard *v.* Wait, 16 Gray, 55; Thorndike *v.* Bath, 114 Mass. 116; Russell *v.* O'Brien, 127 Mass. 349.

[4] Am. Ex. Co. *v.* Smith & Crittenden, 57 Iowa, 242. See Devoe *v.* Brandt, 53 N. Y. 462.

[5] O'Donald *v.* Constant, 82 Ind. 212.

goods are not attachable as the property of the consignor, even though he has retained a bill of lading.[1] Though such evidence of ownership is like commercial paper, transferable by delivery; and though ordinarily a shipper who retains the bill of lading in his hands has control of the goods shipped so as to be able to put them into the legal possession of any one by giving him, or sending to him such evidence of ownership, yet when the goods have been consigned to pay debt, as above stated, the consignor retains no ownership; and the bill of lading, by being subsequently transferred to another, would not convey the goods. The bill differs from commercial paper in an important feature. It cannot convey a better title than the consignor possesses at the time of its delivery as a symbolic delivery of the property, while commercial paper passes from hand to hand leaving no question as to the right of the transfer.[2]

Sec. 4. Exemption.

Attachable property, including property rights, interests, credits, assets—all species, real and personal, is necessarily limited by the statutes to that which is owned by the defendant and liable to execution in satisfaction of any judgment which the attaching creditor may obtain. Obviously, it must be limited to the defendant's ownership, since otherwise the attachment would conflict with the rights of the true owners; and it must be restricted to property not exempt from execution, since otherwise its conservation for the purpose of effectuating the judgment would be idle and absurd.[3]

The attachment statutes expressly except from their authorizations, property exempt by law from execution; but were they silent on the subject the effect would be the same, since the exemption laws would render such attachment a work of super-

[1] Straus *v.* Wessel, 30 Ohio St. 211.

[2] Emery's Sons *v.* Irving National Bank, 25 Ohio St. 368; (Benj. on Sales, § 864.)

[3] It cannot reach the wife's separate, statutory estate in Alabama: McMullen *v.* Lockard, 64 Ala. 56. See Williams *v.* St. Louis, Iron Mountain, &c. R. R. Co. 8 Mo. App. 135; Frank *v.* Siegel, 9 Mo. App. 467; Somers *v.* Emerson, 58 N. H. 48.

erogation and of abortive results. For instance, the debtor's homestead could not be attached, if secured to him by a homestead law, though the attachment law of his State should contain no exception in favor of that or any other exemption. Where no distinct property, such as the homestead, is rendered legally exempt, but the law generalizes so as to allow the debtor's retention of property to a certain pecuniary value, there may be difficulty in ascertaining whether property pointed out by the plaintiff for attachment is really susceptible of it. Though attached in good faith, it may afterwards prove unattachable because in conflict with the exemption.

Whether the true state of facts be ascertainable before or after the levy, the rule still holds that any property or property right of the defendant not susceptible of being seized and sold under a writ of execution after judgment, is not attachable.[1] Under exemption laws the debtor is allowed to retain some designated kinds of his property, free from the attacks of creditors; such as homesteads, necessary household furniture, implements of husbandry and of trades.[2] Often the amount excepted from execution is designated. Whatever is thus exempt from execution cannot he subjected to preliminary seizure by the creditor with the view to execution. But as the debtor may waive his rights under the exemption laws and allow all his property to be seized and sold under execution, so he may waive them when his exempt property is preliminarily attached.[3] Silent acquiescence in an attachment creates the presumption of waiver. If the defendant does not set up his exemption right

[1] Rowell *v.* Powell, 53 Vt. 302; George *v.* Bassett, 54 Vt. 217; Parks *v.* Cushman, 9 Vt. 320; Halsey *v.* Fairbanks, 4 Mason, 206; Handy *v.* Dobbin, 12 Johns. 220; Pierce *v.* Jackson, 6 Mass. 242; Savery *v.* Browning, 18 Iowa, 246; State *v.* Sandford, 12 Nebraska, 445; Gall *v.* Hinton, 7 Abb. Pr. 120; Spencer *v.* Blaisdell, 4 N. H. 198; Crocker *v.* Pierce, 31 Me. 177; Davis *v.* Garrett, 3 Iredell, 459; Nashville Bank *v.* Ragsdale, Peck, 296; Myers *v.* Mott, 29 Cal. 359; Plant *v.* Smythe 45 Cal. 161; Wilson *v.* Paulson, 57 Ga. 596; Cox *v.* Milner, 23 Ill. 476; Sappington *v.* Oeschli, 49 Mo. 244; Reed *v.* Ownby, 44 Mo. 204.

[2] Fish *v.* Street, 27 Kan. 270; Parshley *v.* Green, 58 N. H. 271; Carkin *v.* Babbitt, 58 N. H. 579.

[3] State *ex rel.* Kahoon *v.* Krumpus, 13 Neb. 266; Taffts *v.* Manlove, 14 Cal. 47; Buzzell *v.* Hardy, 58 N. H. 331.

by way of defense to the attachment suit in which he personally appears, he cannot avail himself of it to defeat execution after judgment.[1]

The proper time for asserting exemption rights is when the levy is made. The debtor should then make known to the attaching officer that a thing is not liable to levy if such is the case; and, if it forms but a part of property, of which the major portion is attachable, he should then point out and claim what he is legally entitled to retain; and, when he is present, or so situated that he may easily be present, or otherwise knows of the attachment of the whole, and makes no claim to his part, and no explanation or statement of his exemption right therein to the officer, he will be presumed to have waived his right.[2] So far as any action against the officer, as a trespasser, is concerned, such acquiescence on the part of a debtor with knowledge of the levy would be a complete waiver, which would entirely protect the officer so far as the defendant is concerned; but so far as the debtor's defense to the attachment suit is concerned, silence at the time of the levy does not invariably estop him from setting up exemption in his answer. The presumption of waiver may be overcome by a proper showing. He may obtain possession of his exempt property by replevy.[3]

He cannot, by making a place his homestead, defeat an attachment previously laid upon it.[4] The reason is that when such farm or dwelling has been legally attached, a lien in favor of the creditor is put upon it; and a subsequent election, on the part of the defendant, cannot remove such lien. Were the rule otherwise, the creditor might not only fail to conserve that property for execution but lose his opportunity of attaching any other, as all the rest might be meanwhile mortgaged, sold or

[1] Kelly *v.* Dill, 23 Minn. 435; State *ex rel.* Kahoon *v.* Krumpus, 13 Neb. 266; State *v.* Manly, 15 Ind. 8; Perkins *v.* Bragg, 29 Ind. 507; Barney *v.* Keniston, 58 N. H. 168.

[2] Behymer *v.* Cook, 5 Col. 395; Smith *v.* Chadwick, 51 Me, 515; Calson *v.* Wilson, 58 Id. 416; Nash *v.* Farrington, 4 Allen, 157; Clapp *v.* Thomas, 5 Id. 158.

[3] Hoisington *v.* Armstrong, 22 Kan. 110.

[4] Kelly *v.* Dill, 23 Minn. 435.

attached by others. But, as he, like all others, must be presumed to know the law, (including exemption statutes,) he attaches subject to the defendant's right to claim exemption if such right has not been waived; and the attachment can create no lien that would defeat such right.

When the law exempts either of two pieces of property; or one, however many the debtor may possess, (as, one house, one cow, one piano,) the debtor must point out the thing for which he claims exemption, or his right will be considered waived. He must make known his election of the exempt property at once, and not stand silent till the officer has decided what to seize and has actually made the levy; or if no prior opportunity has been afforded him, he should elect soon after the seizure. He must not play fast and loose; must not maintain such a position that he can claim exemption for any one of several articles attached, on the ground that that particular one is exempt. If he sets up no exemption at or about the time of the levy, the officer may attach any one of several articles, though some one be exempt, if any one is sufficient to make the plaintiff's execution good in case of judgment.[1] If he should point out as exempt a piece of property not his own, he would thus be estopped from afterwards setting up his own attached property as exempt, if as much as the law excepts from seizure had thus been pointed out.[2]

One of several articles being attached without remonstrance on the part of the defendant entitled to claim one as exempt, its preliminary seizure is lawful, and the sale in execution after judgment must therefore be so; and as it relates back to the levy, the creditor is not affected by any intermediate notice or record.[3]

Sec. 5. Choses in Action.

A mere paper evidencing debt, such as a promissory note, in the hands of a third person for the purpose of enabling him to

[1] Buzzell *v.* Hardy, 58 N. H. 332; Horn *v.* Cole, 51 N. H. 287. But see Close *v.* St. Clair, 38 Ohio St. 530.

[2] Barney *v.* Keniston, 58 N. H. 168. See Brooks *v.* Chatham, 57 Tex. 31.

[3] Buzzell *v.* Hardy, 58 N. H. 331; Stowe *v.* Meserve, 13 Id, 46; Coffin *v.* Ray, 1 Met, 212; Stanley *v.* Perry, 5 Greenlf. 369; Emerson *v.* Littlefield, 3 Fairf. 148.

collect money due the owner of such paper, is not susceptible of being proceeded against as the *res* in an attachment suit; for, though it belongs to the attachment defendant, it is not the debt of which it gives evidence, nor is it property beyond the value of the mere fabric. The third person having the note in his possession, to collect it for the defendant, is not therefore the debtor of the defendant. The fact that he will be the possessor of money when he shall have collected the note, does not alter the case; for to be garnishable, he must owe money or hold liable property at the time of the service upon him.[1]

The general principle above briefly enunciated, and the remarks to follow, will be understood to be inapplicable where, in any State, such evidences are made attachable by statute.[2] It is, however, held nowhere that the mere evidence of a debt is the debt itself, any more than that the title to land is land itself; and where evidences of debt are made attachable by statute, they are usually attached as representing the debt or

[1] Jackson *v.* Willard, 4 Johns. 41; Denton *v.* Livingston, 9 Id. 96; Handy *v.* Dobbin, 12 Id. 220; Mann *v.* Exrs. of Mann, 1 Johns. Ch. 231; Fletcher *v.* Fletcher 7 N. H. 452; Spencer *v.* Blaisdell, 4 N. H. 198; Howland *v.* Spencer, 14 Id. 580; N. H. Ins. Co. *v.* Platt, 5 N. H. 193; Stone *v.* Dean, Id. 502; Roundlett *v.* Jordan, 3 Greenl. 47; Klinefelter *v.* Blaine, 3 Dana. 468; Maine Ins. Co. *v.* Weeks, 7 Mass. 438; Dickinson *v.* Strong, 4 Pick. 57; Lupton *v.* Cutter, 8 Id. 298; Perry *v.* Coates, 9 Mass. 537; Grant *v.* Shaw, 16 Mass. 341; Andrews *v.* Ludlow, 5 Pick. 28; Francis *v.* Nash, Hardw. 53; Staple *v.* Bird, Barnes, 214; McCarthy *v.* Goold, 1 Ball & B. 387; Padfield *v.* Brine, 3 Id. 294; Knight *v.* Criddle, 9 East. 48; Stewart *v.* Marquis of Bute, 11 Ves. 657; Fitch *v.* White, 5 Ct. 117; Grosvenor *v.* Bank, 13 Ct. 104; Bowker *v.* Hill, 60 Me. 172: Skowhegan Bank *v.* Farrar, 46 Me. 293; Smith *v.* Kennebec, &c. R. Co., 45 Me. 547; Wilson *v.* Wood, 34 Me. 123; Clark *v.* Viles, 32 Me. 32; Copeland *v.* Weld, 8 Me. 411; Hitchcock *v.* Egerton, 8 Vt. 202; Van Amee *v.* Jackson, 35 Vt. 173; Fuller *v.* Jewett, 37 Vt. 473; Jones *v.* Norris, 2 Ala. 526; Marston *v.* Carr, 16 Id. 325; Pierce *v.* Shorter, 50 Id. 318; Ellison *v.* Tuttle, 26 Tex. 283; Tirrell *v.* Canada, 25 Id. 455; Taylor *v.* Gillian, 23 Id. 508; Price *v.* Brady, 21 Id. 614; Moore *v.* Pillow, 3 Humph. 448; Wilson *v.* Albright, 2 G. Greene, 125; Deacon *v.* Oliver, 14 How. 610; Raiguel *v.* McConnell, 25 Pa. St. 362; Allen *v.* Erie Bank, 57 Id. 129; Galena & Southern Wisconsin R. R. Co. *v.* Stahl, 103 Ill. 67; Mayes *v.* Phillips, 60 Miss. 547.

[2] *See* Somers *v.* Losey, 48 Mich. 294.

facilitating the collection of it. When notes are *impounded* they are merely held to prevent their circulation, transfer by mere delivery, *etc.*, in order to conserve the debt due the defendant that it may remain available to the plaintiff upon his obtaining judgment. The statute, whatever it authorizes, however exceptional its authorized procedure may be to general practice, must be the governing law in the State where it has been enacted; and whatever it prescribes as to method must be followed there.

A promissory note is not included in the term "goods" or "effects;" it is not a *chose* in possession, though, when endorsed in blank, such an instrument has been sometimes held such, and to be a chattel or money, like a bank note.[1] But it cannot affect the true character of such paper whether it is endorsed or not. Whether it is so or not, it is only an indication of an existing right—not money, nor credit, nor property. The attachment defendant owns the paper; a third person may possess it, but the obligor of the note is the defendant's debtor and the person who ought to be garnished—not the attorney who holds the written paper for the purpose of collecting the amount acknowledged by the note to be due the defendant; for promissory notes, bonds, accounts, etc., are not choses in possession, nor chattels, nor goods nor effects, within the meaning of the law of attachment; and statutes are not to be construed as extending the meaning unless where such interpretation is obviously the right one by the terms of the statute.[2]

The levy upon the written evidence of a credit due the defendant, in the form of a note of hand, found in the possession of the defendant or of some bank or other agent of his, instead of garnishing the creditor who owes him the debt evidenced by the note, is not different in principle from the attachment of book accounts instead of garnishing those who owe

[1] Bradley *v.* Hunt, 5 Gill. & Johns. 54; McNeilage *v.* Halloway, 1 B. & A. 218; Brush *v.* Scribner, 11 Ct. 388, (though these cases do not decide that such *choses* may be seized and sold under execution.)

[2] Grosvenor *v.* The Farmers' & Mechanics' Bank, 13 Ct. 104; Fitch *v.* Waite, 5 Ct. 118, 123; N. H. I. F Co. *v.* Platt, 5 N. H. 193; Maine Fire Ins. Co. *v.* Weeks, 7 Mass. 438; Perry *v.* Coates, 9 Mass. 537.

what the accounts show to be due the defendant. In the latter case, it is held that levy on the account books is not a levy on the debts charged therein due by others to the defendant.[1]

While money in a garnishee's hands belonging to an individual member of a partnership has been held to render the possessor garnishable in a suit against the firm, a chose in action so held does not make him liable.[2]

If one creditor should attach a promissory note or bill of exchange found in the possession of the debtor, and another should attach the debt itself in the hands of the third person owing it to the defendant, by the process of garnishment,[3] it would plainly appear that the first would have seized only the evidence of the indebtedness while the second would have attached the debt. Which would have created a lien? Which would have something susceptible of being proceeded against as the *res* in the ancillary proceeding? Certainly the creditor who had garnished the obligor would be the only attacher of the credit due to the defendant.[4] The other, having merely the evidence of the fact that the maker of the note owes the defendant, would have nothing attached which could be proceeded against. In a conflict between the rival creditors, there can be no doubt that the one who should garnish the maker of the note and attach the defendant's credit in the garnishee's hands would be preferred. Even if the garnishment should take place subsequently to the seizure of the paper-evidence, it would hold good.

There would seem to be no meaning in authorizations to attach notes, bills, etc., unless the word "attach" has the limited meaning that evidences of debt may be taken preliminarily to a valid attachment of the debt due the defendant by the subsequent garnishment of his debtor.

It may be said that except so far as statutes expressly authorize

[1] Lesher *v.* Getman, 30 Minn. 321; Fernald *v.* Chase, 37 Me. 289; Tingley *v.* Dolby, 13 Neb. 371; Ide *v.* Harwood, 30 Minn. 191.

[2] Pierce *v.* Shorter, 50 Ala. 318; Stevens *v.* Perry, 113 Mass. 380.

[3] Bills *v.* Nat. Park Bank, 89 N. Y. 343.

[4] Prout *v.* Grout, 72 Ill. 456.

the taking of promissory notes, bonds,[1] certificates of stock, accounts, title deeds to lands, book accounts, and other evidences of debt or property, such things are not attachable on general principles, because their presence in court is not the presence of the debts or property which they evidence or indicate.[2]

If the object is to attach the defendant's right to receive payment on the promissory notes, bonds, etc., which he holds, and not to proceed against his debtor by way of garnishment, the attachment would be that of an incorporeal thing; and the taking of the evidences, in such case, might be made by statute the legal method of proceeding against such right or interest. In other words, the law may create a hypothetical subrogation, putting the attaching creditor in the shoes of the original payee, and creating a lien upon the debt due the defendant. It would seem that only in this way can authorizations to attach such evidences be rendered practical and available.

Sec. 6. Method of Seizing.

Attachable property, owned and possessed by the debtor, may be real or personal or mixed; it may be tangible or incorporeal. Its nature determines, to a considerable degree, what is necessary to its valid seizure. Land is not susceptible of manipulation, and therefore it is attached by serving a copy of the writ upon the tenant in possession without disturbing his tenancy, and then returning the writ with a statement of the fact of levying attached thereon.[3] Service of the copy on the tenant is not a universal requirement.[4] The endorsement on the writ should contain a certain description of the real

[1] Providence & Stonington S. S. Co. *v.* Va. Fire & Marine Ins. Co. 20 Blatchf. C. C. 405.

[2] Probst *v.* Scott, 31 Ark. 652; Prout *v.* Grout, 72 Ill. 456. See with reference to this subject, Bradford *v.* Gillispie, 8 Dana, 67; Hergman *v.* Dettlebach, 11 How. Pr. 46; Brower *v.* Smith, 17 Wis. 410; Codington *v.* Gilbert, 5 Duer, 72; Ohors *v.* Hill, 3 McCord, 338; Fernald *v.* Chase, 37 Me. 289; Lesher *v.* Getman, 30 Minn. 321; Matheny *v.* Hughes, 10 Heisk. 401.

[3] Hancock *v.* Henderson, 45 Tex. 479; Wood *v.* Weir, 5 B. Mon. 544; Lyon *v.* Sanford, 5 Ct. 544; Scott *v.* Manchester Print Works, 44 N. H. 507.

[4] Rogers *v.* Bonner, 45 N. Y. 379; same, 55 Barb. 9.

estate attached.[1] If the description is certain, it need not be an accurate detail of the metes and bounds with such particularity as would be required in a title deed, or even in a writ of execution.[2] But if the description is ambiguous or otherwise uncertain, there is no valid attachment by notice to the tenant in possession coupled with such a return.[3]

If the sheriff notifies the tenant in possession and so returns what real estate he has attached that it may be made the object of the ancillary action and the bearer of a lien securing the creditor's claim, it is not necessary to show in the return that he has been personally upon the land, or that he has performed any act or ceremony by way of attaching it. The act of attaching must be such as to create a lien upon the land susceptible of being perfected by judgment, since that is the very object of the process.[4] Though courts have frequently held that an accurate description of real estate attached, as in a title deed, is not necessary to the validity of the attachment nor the creation of the lien, yet the better practice is to make such description, with the metes and bounds and number of acres stated. Such particularity can never do harm and can never give occasion for the attack of the service as imperfect because of uncertainty of description. In a contest among attaching creditors, such particularity may serve a good purpose. In recording the attachment of land, an accurate description becomes necessary. Considered as a preliminary seizure for the purpose of eventual execution, there is much reason for making

[1] Buckhardt *v.* McClellan, 1 Abb. App. Dec. 263; Carleton *v.* Ryerson, 59 Me. 438; Taylor *v.* Mixter, 11 Pick. 341.

[2] Crosby *v.* Allyn, 5 Me. 453; Bacon *v.* Leonard, 4 Pick. 277; Whitaker *v.* Sumner, 9 Pick. 308; Pratt *v.* Wheeler, 6 Gray, 520; Howard *v.* Daniels, 2 N. H. 137; Moore *v.* Kidder, 55 N. H. 488.

[3] Menley *v.* Zeigler, 23 Tex. 88; Porter *v.* Byrne, 10 Ind. 146; Hathaway *v.* Laribee, 27 Me. 449; Lambard *v.* Pike, 33 Me. 141; Fitzhugh *v.* Hellen, 3 Har. & J. 206; Henry *v.* Mitchell, 32 Mo. 512.

[4] Yeatman *v.* Savings Institution, 95 U. S. 764, and cases cited therein at p. 766 on liens; Saunders *v.* Columbus Life Ins. Co. 43 Miss. 583; Worcester Nat. Bank *v.* Cheeney, 87 Ill. 602; Carter *v.* Champion, 8 Ct. 549; Patch *v.* Wessels, 46 Mich. 249; Chandler *v.* Dyer, 37 Vt. 345; Adler *v.* Roth, 2 McCrary, 445.

the description of land attached as full and accurate as its description when it is to be sold under execution, though the practice does not imperatively require it. It would be not advisable for the sheriff to rely too strongly upon decisions sustaining doubtful descriptions when he has it in his power to make a perfect return free from any invitation to attack.

Attachment of land by such notice, description and return is presumed to be that of the defendant, whether the officer so states it or not. The return is an answer to the command to seize property of the defendant; and the statement that real estate of a certain description has been attached implies that the order has been obeyed. The attachment is, therefore, not radically defective when the sheriff fails to describe the land as belonging to the defendant,[1] though he ought so to state.

When the debtor owns some interest in land and has the control of such interest, it may be directly attached—notice being given to him. Legal interests susceptible of bearing a lien are proper subjects of attachment. In California, interests in land, whether legal or equitable, perfect or imperfect, and whether executory or executed when they lie in contract, are attachable.[2] In Tennessee, the right of redemption in land sold under execution may be attached in a suit in equity against a non-resident debtor.[3] Whatever interest may become subject to the attachment lien, is, as a general rule, attachable in all the States. And though such interest is an incorporeal thing, it may nevertheless constitute the *res* against which the property-action is directed. And when such lien has been created, it is not lost by the transformation of the incorporeal to a corporeal thing: as when an undivided interest in real estate is merged into the part which falls to the defendant upon

[1] Miller *v.* Fay, 40 Wis. 633; Porter *v.* Pico, 55 Cal. 165; Saunders *v.* Columbus Life Ins. Co. 43 Miss. 583; King *v.* Bucks, 11 Ala. 217; Rowan *v.* Lamb, 4 G. Greene, 468; Stoddart *v.* McMahon, 35 Tex. 267.

[2] Fish *v.* Fowlie, 58 Cal. 373.

[3] Herndon *v.* Pickard, 5 Lea, 702. In Minnesota, the right of the mortgagor to redeem may be attached, when the chattel is still in the hands of the mortgagee. Becker *v.* Dunham, 27 Minn. 32.

partition.[1] And this results, whether the partition is made after the attachment or is made before without notice to the attaching creditor and beyond his knowledge. The defendant is not put to the worse by the lien following the interest from the mass to a distinct apportionment of the property. If his interest in an undivided tract of land is attached, and a division subsequently is made by which one-half of the tract is set off to him as his share, the lien will pass to his portion and leave the other half free and unincumbered.

It has been held that an execution levied upon the right, title and interest of a judgment debtor is a levy upon the land itself for all practical purposes, if the title is wholly in him; and that a sale under such levy would convey the land.[2] And, if there is a mortgage resting upon the land, and the right, title and interest of the owner executed and sold, it has been held that the land itself will be thus conveyed, and the mortgagee must look to the proceeds.[3]

There can be only constructive attachment, when some interest under the control of, and owned by the defendant, is proceeded against. Not being susceptible of manipulation, it can be attached in idea merely, by giving notice, and returning that it is attached. There is, however, a legal transfer of control and possession from the defendant to the officer, if the levy is valid. In the eye of the law, the latter takes possession of the incorporeal thing, brings it into court, and holds it *in custodia legis*. The owner of it cannot dispose of it in any way that will disencumber it of the lien.

Personal property should be seized in preference to real, even when the statutes to do not imperatively require such preference. It is the species of property most readily taken into actual possession, and is that which is most usually the subject of attachment.

Goods and chattels are attached by the actual taking of them

[1] McMechan *v.* Griffing *et al.*, 9 Pick. 538; Munroe *v.* Luke, 19 Id. 39; Crosby *v.* Allyn, 5 Me. 453; Argyle *v.* Dwinel, 29 Me. 29.

[2] Vilas *v.* Reynolds, 6 Wis. 214.

[3] Trudeau *v.* McVicar, 1 La. Ann. 426; Duchaud *v.* Rousseau, 2 La. Ann. 168, 173.

by the sheriff from the possession of the debtor, and transferring them to the control of the court. They cannot ordinarily be the subject of constructive seizure. Possession creates the presumption of ownership in movable property; and therefore, if attached goods were left in the hands of the debtor, he might validly convey them to an innocent purchaser buying without notice of the attachment; and then the property action would be at an end for want of the thing proceeded against.

Whatever is, in its nature, susceptible of being manipulated, can be validly attached only by the taking of it into the charge and control of the executive officer, acting under the court. Whether it is handled and removed or not; whether it is transferred to the officer's ware-house or left in its original locality in charge of a keeper appointed by the officer; whether it is retained directly by the officer or entrusted by him to a receiptor or given in charge to the defendant himself under a forthcoming bond, it must be subjected to, and continued under the control of the court so as to constitute the *res* of the action.

In seizing a growing crop, the sheriff must obtain control of it, give proper notice to the person in charge of it, make such inventory as is practicable, and duly return his action to the court, but he must not gather the crop before it is ripe, nor prevent its cultivation meanwhile. It would manifestly be an act of folly to take possession of, and remove for safe keeping, any species of property of such a nature that it would be destroyed by such action. The object of the legislator, in providing the remedy of attachment, is to enable the creditor to make his money out of the property of the debtor; not to provoke the wanton destruction of the property which would be of no benefit to the creditor while causing loss to the debtor and diminishing his ability to pay. If the nature of the property is such that it cannot be taken into the physical possession of the officer without its destruction, it cannot legally be so taken; if, though attached, it cannot be removed without such result, it is not legally removable. Illustrations are found in the nature of growing crops in the field, unripe fruit in the

orchard, unformed vegetables, fresh fish and meat, articles under process of being manufactured, etc.[1]

The taking and holding of any attachable property must be such as to maintain the incipient lien, to perfect it upon judgment, and eventually to enforce it by sale of the thing attached. Since the taking is preliminary to execution, it is as important that the property should be actually taken and held as if the seizure were made after judgment under a writ of execution.[2]

Actual manipulation is not always necessary. Nothing is added to the sanctity of a seizure by laying hands on the article attached. Grain in bulk, ships, steamboats, and any cumbrous property may be left where found, without any act done to the thing seized, provided the sheriff really takes it in charge and holds it directly, or indirectly by his servants, or by others legally authorized to hold under him. What is meant by saying that there must be actual seizure is that there must be a real transfer of the legal possession and control from the debtor to the sheriff.

A real or actual attachment is not accomplished by serving a copy of the writ on the person in charge of goods, acquainting him of the character of the paper, making an inventory of the goods and returning the writ into court with a statement endorsed thereon that the goods have been attached.[3] Such procedure on the part of the officer might subject him to damages in a suit by the defendant for wrongful constructive seizure without amounting to a valid attachment.[4]

Seizing goods by merely declaring them to be seized, and posting notice of the attachment upon or above the goods, and making a return, does not constitute a legal attachment.[5]

[1] Raventas *v.* Green, 57 Cal. 254; Penhallow *v.* Dwight, 7 Mass. 34; Bond *v.* Ward, Id. 123; Wilds *v.* Blanchard, 7 Vt. 138; Wallace *v.* Barker, 8 Vt. 440; Norris *v.* Watson, 2 Fos. 364.

[2] Patch *v.* Wessels, 46 Mich. 249; Adler *v.* Roth, 2 McCrary, 445.

[3] Miles *v.* Brown, 38 N. Y. Sup. Ct. 490.

[4] St. George *v.* O'Connell *et al.* 110 Mass. 475.

[5] Rix *v.* Silknitter, 57 Iowa, 262. Bryant *v.* Osgood, 52 N. H. 182. But a sheriff made a memorandum of a portable threshing machine and its accompaniaments, served a copy of the attachment and summons on the defendant, and told a workman near by to look after the articles and tell

Certainly such acts would not be of avail in competition with a second attachment actually made and the goods legally retained by the officer or by a keeper duly appointed. A seizure may be good with respect to the defendant yet not as to third persons; it may have radical defects as an attachment, yet hold good against purchasers from the defendant thereafter, so as to sustain the charge that they bought with knowledge of the attachment.

When property has already been attached and is in the lawful possession of the sheriff, a second attacher cannot take it from him.[1] And there is no need for such taking, since the property is already safe in the custody of the law, and the second attacher is fully protected in his rights.

Interests may be such as to be susceptible of only constructive seizure; but the general rule may be expressed in brief, that the attachment of movable property is its actual seizure under the writ, and the transfer of its possession and control from the defendant to the officer who must continue his legal custody of it in order to maintain the validity of the attachment.[2]

any intermeddler that they were attached; and this seizure was held good as against purchasers from the defendant with knowledge. Rogers *v.* Gilmore, 51 Cal. 309.

[1] Benson *v.* Berry, 55 Barb. 620.

[2] Rix *v.* Silknitter, 57 Iowa, 262; Scott *v.* Davis, 26 La. Ann. 688; Lane *v* Jackson, 5 Mass. 157; Gale *v.* Ward, 14 Mass. 352; Baldwin *v.* Jackson, 12 Id. 131; Ashmun *v.* Williams, 8 Pick. 402; Hemmenway *v.* Wheeler, 14 Pick. 408; Sanderson *v.* Edwards, 16 Pick. 144; Bruce *v.* Holden, 21 Pick. 187; Sutherland *v.* Peoria Bank, 78 Ky. 250; Lyon *v.* Rood, 12 Vt. 233; Blake *v.* Hatch, 25 Vt. 555; Taintor *v.* Williams, 7 Ct. 271; Huntington *v.* Blaisdell, 2 N. H. 317; Dunklee *v.* Fales, 5 N. H. 527; Chadbourne *v.* Sumner, 16 N. H. 129; Smith *v.* Orser, 43 Barb. 187; Learned *v.* Vanderburgh, 7 How. Pr. 379; State *v.* Cornelius, 5 Oregon, 46; Stockton *v.* Downey, 6 La. Ann. 581; Woodworth *v.* Lemmerman, 9 La. Ann. 524; Netson *v.* Simpson, Id. 311; Gates *v.* Flint, 39 Miss. 365; Patch *v.* Wessels, 46 Mich. 249; Sanford *v.* Boring, 12 Cal. 539; Lovejoy *v.* Hutchins, 23 Me. 272; Waterhouse *v.* Smith, 22 Id. 337; Nichols *v.* Patten, 18 Id. 231; Connell *v.* Scott, 5 Baxter, 595; Brooks *v.* State, Id. 607; Culver *v.* Rumsey, 6 Ill. App. 598; same title, 7 Ill. App. 422. In Vermont, however, the possession, though it must be continuous as above stated, may be constructive: Rogers *v.* Fairfield, 36 Vt. 641; Paul *v.* Burton, 32 Id. 148; Strickland *v.* Martin, 23 Id. 484; Bucklin *v.* Crampton, 20 Id. 261.

The process should be served upon the person in possession at the time of the seizure.[1] Such person may be the debtor himself or some person in his employ holding not as a legal possessor in his own right who can be reached only by garnishment. The difference between the possession by a clerk, employee or servant of the defendant and that by one who holds under contract as the legal possessor for a stipulated time, is sufficiently apparent. In the first case, the lawful possession is in the defendant and the property may be directly attached, process being served on him and the employee immediately holding: in the second, the lawful possession is in the person liable to garnishment, as above mentioned.

There should be enough taken under the writ to satisfy the plaintiff's demand, and the officer who takes too little when he might attach a sufficient quantity of goods or other property to pay the defendant's debt is liable to the plaintiff.[2] There should not be too much taken, lest the defendant complain. He might rightfully complain if the goods or other property attached should be greatly excessive, and he would have a remedy for his wrong in an action against the officer. So here is the officer, between the rock and the gulf. He is responsible to both parties for sound and reasonable discretion in performing his duty.[3] His safety is in steering straight.

A sheriff or his deputy, in making a levy under a writ of attachment, may use such force as necessity will justify. The deputy may be obliged first to show his authorization, unless he is already known as a public officer duly empowered to execute such a writ. In other respects, his powers, as to the use of force, are as great as those of his principal officer, when it is his duty to make a levy. Though violence may not be done to the debtor's castle, the dwelling where he resides with his family, there is not the same sacredness attached to his store or out-buildings.[4] To make an attachment, the sheriff cannot

[1] Grieff *v.* Betterton, 18 La. Ann. 349.

[2] Ransom *v.* Halcott, 18 Barb. 56; Howes *v.* Spicer, 23 Vt. 508.

[3] Fitzgerald *v.* Blake, 42 Barb. 513; Dewitt *v.* Oppenheimer, 51 Tex. 103.

[4] Messner *v.* Lewis, 20 Tex. 221; Fullerton *v.* Mack, 2 Aikens, 415; Burton *v.* Wilkinson, 18 Vt. 186; Platt *v.* Brown, 16 Pick. 553.

break into a dwelling. An out-house may be opened without first requesting the debtor to unlock the door, though such request is necessary before breaking open a barn or other building adjoined to the dwelling. A store or warehouse may be broken open to reach goods to be attached, when the storekeeper renders such action necessary by refusing admittance.[1] Upon entering a store, either by force or otherwise, the officer should remain no longer than may be reasonably necessary to perform his trust.[2] Should he unnecessarily expel the owner, or exclude him from his place of business for an unreasonable time, the officer would be liable in damages.[3]

The sheriff, in executing an attachment writ, may open the safe of a trust company, and the box of the defendant, to seize and take into custody securities and other valuables there deposited.[4] He should not resort to force, however, in executing such a delicate trust, before first requesting the proper officer of the trust company to unlock the safe for him, and also requesting the debtor to open his own box if the latter is practicable.[5]

An officer is not only liable to damages, and to have his service of writ invalidated by his breaking the front door of the debtor's dwelling, but also by breaking the inner doors leading to rooms rented by sub-tenants, when such rooms are of such a character as to constitute the dwelling house of the occupants. Build-

[1] Burton *et al. v.* Wilkinson *et al.* 18 Vt. 189, citing Penton *v.* Brown, 1 Keb. 698; Haggerty *v.* Wilber, 16 Johns. 287.

[2] Williams *v.* Powell, 101 Mass. 467; Malsom *v.* Spoor, 12 Met. 279.

[3] Perry *v.* Carr, 42 Vt. 53.

[4] U. S. *v.* Graff, 67 Barb. 304.

[5] Held in Ilsley *v.* Nichols *et al.* 12 Pick. 270, that if a civil officer breaks open a dwelling house by forcing the outer door, against the prohibition of the owner with the direct and avowed purpose of making an attachment of the owner's goods in the dwelling house, such breaking is not only an unlawful act, but the attachment made by means of it is invalid. And the following authorities, bearing on the point, *pro* and *con*, were cited and discussed by C. J. Shaw: Bac. Abr. *Sheriff*, N. 3; Seymane *v.* Gresham, 5 Rep. 93; Lee *v.* Gansel, Cowp. 1; Heminway *v.* Saxton *et al.* 3 Mass. 222; Widgery *v.* Haskell, 5 Mass. 155; Luttin *v.* Benin, 11 Mod. 50; Barlow *v.* Hall, 2 Anstr. 462; Loveridge *v.* Plaistow, 2 H. Bl. 29; Birch *v.* Prodger, 4 Bos. & Pul. 135; Lyford *v.* Tyrrel, 1 Anstr. 85; Wells *v.* Gurney, 8 Barn. & Cressw. 769; *Ex parte* Wilson, 1 Atk. 152. Many of the same cases are reviewed in The People *v.* Hubbard, 24 Wendell, 370: Cowen, J.

ings rented in flats may serve for illustration. Each flat is as sacred as any resident's separate castle. There may be a common entrance, a common hall, and some other parts of the building may be used in common; but each particular flat is the home of a family, and therefore is inviolable as any separate dwelling house.[1]

The rule is that a levy is not to be effected by committing a trespass; and that the trespasser may not only be punished for his offense but the civil act performed by means of the trespass will be invalidated, though there be no other reason for setting it aside.[2]

It is commonly said that the attaching officer must make himself liable for trespass in levying upon personal property, but for the protection given by the writ; or, in other words, that he must do such acts as would render him liable as a trespasser if not thus authorized. He might be obliged to do acts, if resisted, which would be not ordinarily justifiable in order to obtain and maintain possession and control. While it is true that a "paper levy" is nugatory, and a mere declaration that goods are seized is ineffectual, yet there is no need of manipulation or any harsh taking, where there is no resistance made. There ought to be an inventory or proper description of that which is attached, and complete change of custody. Even if the person in charge of the property before seizure should remain in charge thereafter, it should be as the appointed keeper that he subsequently holds. But no levy is valid unless the officer gets legal possession; and get it he must though acts ordinarily deemed trespass become requisite.[3]

Attachment effected by trick, treachery, fraud or trespass is reprobated by the courts and held of no legal force. The wrongdoing officer not only exposes himself to an action in damages

[1] Swain *v.* Mizner, 8 Gray, 183, (cited for the principle, though not the illustration.)

[2] Baily *v.* Wright, 39 Mich. 96.

[3] Rix & Stafford *v.* Silknitter, 57 Iowa, 265; Allen *v.* McCalla, 25 Iowa, 464; Polley *v.* Lenox Iron Works, 15 Gray, 513; Haggerty *v.* Wilber, 16 Johns. 287; Bailey *v.* Adams, 14 Wend. 201; Henry *v.* Quackenbush, 48 Mich. 415; Abrams *v.* Johnson, 65 Ala. 465; Cobb *v.* Gage, 7 Ala. 619; Cawthorne *v.* McGraw, 9 Ala. 519; Foster *v.* Mabe, 4 Ala. 402; Goode *v.* Longmire, 35 Ala. 668;

for his cunning and rascally maneuvres, but he also strikes his own act with illegality, so that the plaintiff cannot avail himself of a seizure so made, though not personally privy to the officer's methods. And when the plaintiff himself is the trickster or the trespasser by means of deception practiced on the officer to induce him to do things smart; or is a co-worker with the latter in executing a legal writ in an illegal way so as to create a nullity, both are responsible to any injured party, and the writ is as though it had never been executed at all.[1] If the plaintiff, however, is not an instigator or encourager of the officer in acts of deception, intrigue or trickery, he ought not to lose the benefit of the attachment, but the officer alone should be held responsible. The court will always judge, from the circumstances of each particular case, whether the official wrongdoing was such as to invalidate the levy.[2]

The sheriff may deputize a disinterested person to act in his stead, but he cannot authorize the plaintiff himself to make the levy.[3] If the property is in the hands of the defendant, the reasons are many and manifest why the plaintiff should not serve the summons and make the levy in his own behalf. If the creditor is attaching what is already in his own hands, he has no occasion to summon himself, interrogate himself as garnishee, or do any like supererogatory act.[4] No interested person can lawfully serve the writ or make the levy—not even the sheriff himself if he is interested.[5]

A copy of the order of the attachment is generally required to be left with the person in possession of the premises on

[1] Upton *v.* Craig, 57 Ill. 257; Lesher *v.* Getman, 30 Minn. 321; Pomroy *v.* Parmlee, 9 Iowa, 140; Herring *v.* Hoppock, 15 N. Y. 409; Timmons *v.* Garrison, 4 Humph. 148; Deyo *v.* Jennison, 10 Allen, 410; Metcalf *v.* Clark, 41 Barb. 45; Nason *v.* Esten, 2 R. I. 337; Powell *v.* McKee, 4 La. Ann. 108; Paradise *v.* Farmers' and Merchants' Bank, 5 Id. 710; Wingate *v.* Wheat, 6 Id. 238; Myers *v.* Myers, 8 Id. 369; Gilbert *v.* Hollinger, 14 Id. 441. See Hollister *v.* Goodall, 8 Ct. 332.

[2] Hitchcock *v.* Holmes, 43 Ct. 528. An officer got into a dwelling by pretending that he wanted to see the debtor's mother-in-law, and, when in, attached the furniture. It was held that the entry was lawful.

[3] Dyson *v.* Baker, 54 Miss. 24. But see, as to authorizing a deputy, Menderson *v.* Specker, 79 Ky. 509.

[4] Graigle *v.* Notnagel, Pet. 246.

[5] Dyson *v.* Baker, 54 Miss. 24.

whom the writ is served; and, the omission of this has been held fatal,[1] though it should rather be treated as an irregularity.[2]

Sec. 7. Time of Seizing.

The writ has till the return day to run, but it is the duty of the officer in charge of it to serve it on the day he receives it, or as soon as practicable, unless instructed or permitted by the plaintiff to make delay, or unavoidably hindered in some way. It is true that in many cases no evil arises from a little procrastination. If the debtor is honest, or the property not portable, or there are no competing creditors, the execution of the writ on the last day of its term might suffice; but, in such a conjunction of circumstances, there is hardly any need for such writ at all. An ordinary suit might result in judgment soon enough; and then the issue of an execution would preclude the necessity for an ante-judgment attachment.[3]

Should the plaintiff suffer loss by the unnecessary dallying of an officer, he ought to be recompensed therefor in damages, though the limit of the time for the return may not have arrived. But the officer is not bound, under ordinary circumstances, to proceed with any unusual degree of celerity. If the writ is placed in his hands late in the day, he may await till the following day before making the levy, though it is possible to perform the duty immediately. He might not be subjected to damages, under ordinary circumstances, should he delay for several days when busy with other official duties, if the plaintiff makes no request for immediate or early action, and if the officer knows of no reason why he should avoid such delay; but, in such case, he takes the risk should the plaintiff suffer loss by the procrastination.

When immediate action is urgent, and the plaintiff instructs the officer to execute the writ immediately upon property which he points out—upon a steamboat just about to leave the wharf for a trip beyond the State lines, for instance—it is the duty of

[1] Sparp *v.* Baird, 43 Cal. 577.
[2] Wilkins *v.* Tourtellott, 28 Kan. 825.
[3] Scheib *v.* Baldwin, 22 How. Prac. R. 278.

the officer to proceed with such dispatch as is compatible with good and secure work, notwithstanding the many remaining days within which the writ is returnable. Even if the plaintiff has not urged such celerity but has pointed out the property to be seized, the officer ought to move with reasonable dispatch if he knows, though the plaintiff does not, that in case of a few hours delay the object of pursuit would probably elude his grasp.

The time of executing is not only important with reference to the possible removal of his property by the debtor in case of the officer's delay, but also with regard to priority of lien when there are competing attachments. So far as the defendant is concerned, the levy on the last day of the writ's duration is just as effectual as on the first; and, even after the expiration of the specified time, an attachment may serve its purpose as to him, if he should not have it dissolved prior to judgment and make way with his property before judgment and seizure under execution.[1]

Levy is too late if made after notice of insolvency proceedings against the debtor has been published,[2] although the writ may yet have several days to run; and it is always too late if made after the return day.[3] The officer ought not to wait till the time has nearly expired, but should proceed with reasonable celerity, even though not specially urged by the attaching creditor, that he may not only have the satisfaction of having promptly done his duty but also that he may avoid personal liability in case the intended seizure should slip his fingers;[4] for the officer may render himself liable to the plaintiff for loss caused by tardiness in moving, though the writ may yet have considerable time to run.[5] He is not expected to be on the alert at unseasonable hours, between midnight and day,[6] unless specially advised that extraordinary vigilance and energy

[1] In Indiana, held that attachment writs there run till executed, or till, with reasonable diligence, they may be executed. Will *v.* Whitney, 15 Ind. 194.

[2] Gallup *v.* Robinson, 11 Gray, 20.

[3] Peters *v.* Conway, 4 Bush, 566; Dame *v.* Fales, 3 N. H. 70.

[4] Kennedy *v.* Brent, 6 Cr. 187.

[5] *Id.*

[6] Whitney *v.* Butterfield, 13 Cal. 335.

are necessary to prevent the removal of the debtor's property at such hours, or for the purpose of the plaintiff's gaining priority of rank among creditors.

It was held, under the New York Code of Civil Procedure, § § 638, 788, which required service of summons "within thirty days after the granting thereof," that Sunday must be excluded when it is the thirtieth day, and that the service may be made on the Monday following.[1]

The subject of attaching with reference to the time of seizing will necessarily be further discussed in treating of priority of liens.

Sec. 8. Wrongful Levy.

The writ is not usually directed against particular things but against the alleged debtor's effects in general. The plaintiff may point out particular property of the defendant and instruct the officer to attach it, but if it should turn out that the thing thus pointed out and seized does not belong to the defendant, both the plaintiff and the seizing officer would be liable for the wrong done.[2] The instructions would be a protection to the officer, between himself and the plaintiff;[3] but not between himself and the injured party. The third person whose property is wrongfully attached as that of the defendant has his action for damage against the officer, or the plaintiff, or both, as the nature of the wrong done may indicate, whether he has intervened in the attachment suit to protect his property or not;[4] whether he has demanded of the officer a release of the property or not;[5] whether he has received the

[1] Gribbon *v.* Freel, 93 N. Y. 93.

[2] Conner *v.* Long, 104 U. S. 229; Marsh *v.* Backus, 16 Barb. 483; Tufts *v.* McClintock, 28 Me. 424; Richardson *v.* Hall, 10 Md. 399.

[3] Page *v.* Belt, 17 Mo. 263; Conner *v.* Long, 104 U. S. 229; Griffith *v.* Smith, 22 Wis. 646; Gower *v.* Emery, 18 Me. 79; Nelson *v.* Cook, 17 Ill. 443; Battis *v.* Hamilton, 22 Wis. 669; Union Lumbering Co. *v.* Tronson, 36 Id. 126; Halpine *v.* Hall, 42 Id. 176; Lesher *v.* Getman, 30 Minn. 321.

[4] Trieber *v.* Blacher, 10 Md. 14; Shuff *v.* Morgan, 9 Martin, (La.) 592.

[5] Rodega *v.* Perkerson, 60 Ga. 516; Stickney *v.* Davis, 16 Pick. 19.

property of the officer and given bond for its delivery upon demand, or not.[1]

The attaching officer is bound to use all reasonable diligence in ascertaining that the property he is about to seize belongs to the defendant and is liable for the debt; he should make thorough inquiry and learn with as great a degree of certainty as possible that the property is attachable, since, otherwise, he seizes at his peril.[2] He should inquire of the person in charge of personal property, as to its ownership.[3]

The seizing officer is not liable as a trespasser when he does his whole duty and yet some wrong ensues which is beyond possible forecast and beyond his control. If he makes all requisite inquiry, uses all legal precaution against error and all reasonable diligence, he ought not to be subjected to the reparation of damages not resulting from his fault. Officers are human, and the law does not hold them responsible for lack of infallibility. Doing the best possible under the circumstances of any particular case, and acting with perfect impartiality between the parties and with entire respect for the rights of others, a seizing officer should be treated with leniency even when through error of judgment or ignorance of fact after due inquiry he should cause damage to another. Under such circumstances, he may be legally responsible, but he ought to have liberal consideration by court and jury.[4]

There are many cases in which it is very difficult for the most astute inquirer to ascertain whether certain property belongs to the debtor or not. He may be baffled in his investi-

[1] Turner *v.* Lytle, 59 Md. 199, under act of 1876; Johns *v.* Church, 12 Pick. 557; Robinson *v.* Mansfield, 13 Id. 139.

[2] Carlton *v.* Davis, 8 Allen, 94; Morrill *v.* Keyes, 14 Id. 222; Gilman *v.* Hill, 36 N. H. 311; Richards *v.* Daggett, 4 Mass. 534; Gibson *v.* Jenny, 15 Id. 205; Smith *v.* Sanborn, 6 Gray, 134; Howard *v.* Williams, 2 Pick. 80; Woodbury *v.* Long, 8 Id. 543; Bean *v.* Hubbard, 4 Cush. 85; Foss. *v.* Stewart, 14 Me. 312; Sibley *v.* Brown, 15 Me. 185; Sangster *v.* Commonwealth, 17 Grat. 124; Cooper *v.* Newman, 45 N. H. 339; Meade *v.* Smith, 16 Ct. 346; Lynd *v.* Pickett, 7 Minn. 184; Caldwell *v.* Arnold, 8 Minn. 265; Ford *v.* Dyer, 26 Miss. 243.

[3] Hildreth *v.* Fitts, 53 Vt. 684.

[4] Luce *v.* Hoisington, 54 Vt. 428; Barrett *v.* White, 3 N. H. 210; Taylor *v.* Jones, 42 Id. 25; Wakefield *v.* Fairman, 41 Vt. 339.

gation by false statements on the part of the defendant or of some next friend who is trying to cover the property to prevent its seizure. In the heat of contention, men sometimes yield to temptation to falsity and convey wrong impressions to a seizing officer, and try to satisfy their consciences with the erroneous assumption that all is fair in war.

Even though the third possessor, whose lawful possession has been disturbed, may have had the property returned upon his giving a receipt therefor, and promising that it should be forthcoming to satisfy the attaching creditor's judgment should the court decree it liable, he will have his action against the officer for trespass, if the attachment was wrongful.[1] He will have his action, whether he has receipted for the goods or not. The officer is liable for seizing, in a carrier's hands, goods not the defendant's, and refusing to surrender them:[2] the refusal to restore aggravating the trespass, though he ought not to be judged harshly when he has attached in good faith and has relinquished with ready good will as soon as he was credibly informed of his mistake. He would not be liable to the third person so disturbed in possession, if he was led into his mistake by such person himself; and if the plaintiff induced the error by pointing out the property as that of the defendant, he would be bound to indemnify the officer for whatever the injured third party had recovered.

If, notwithstanding the existence of a lien upon goods, (such as that of a carrier for freight, with the right of possession till the lien shall be removed,) an officer attach them, the levy may be legal upon the condition that the attachment is to be dissolved and the goods restored to the carrier or other lawful custodian, if the freight or lien-debt is not paid within some fixed time. The officer cannot, if sued for trespass, set up the invalidity of the attachment by reason of such lien.[3] The common carrier is entitled to freight and other lawful charges before goods *in transitu* can be legally seized and taken from

[1] Williams *v.* Morgan, 50 Wis. 548; Perry *v.* Williams, 39 Wis. 339; Robinson *v.* Mansfield, 13 Pick. 139; Morse *v.* Hurd, 17 N. H. 246; Carpenter *v.* Dresser, 72 Me. 377.

[2] Rodega *v.* Perkerson, 60 Ga. 516.

[3] Stearns *v.* Dean, 129 Mass. 139.

his possession in a suit against their owner.[1] If the attachment of such goods were authorized by statute, the carrier's lien would still rest upon them, and the creditor's right would be subordinate.

It is trespass to execute a writ of attachment upon property not attachable.[2] Indeed, the officer can hardly invest himself with the possession of property belonging to another without doing that which would amount to trespass were he not under the protection of the law and acting as its agent in executing its process.[3] He could be little liable to the defendant for laying a second attachment on personal property already in his hands, when the second was under a writ against the same defendant to whom the first was opposed; for, if the defendant is wronged by being deprived of his property, the wrong must have been done in the execution of the first writ.[4]

Every taking of another's property in the act of levying upon the defendant's goods, is not either an attachment of it or a trespass. The officer may have to take temporarily in hand the unattachable vessel in which the attachable goods are contained; or remove the contents of a vessel that is to be attached, *etc.*, without committing any trespass or any wrong; or he may take goods of another when found as part of the common stock of the defendant,[5] to separate them from the stock.

How can a sheriff always accurately distinguish between the defendant's property and that of others when both are intermixed? Sometimes he may attach the mass, after all required

[1] Wolfe *v.* Crawford, 54 Miss. 514.

[2] Ladd *v.* Hill, 4 Vt. 164; White *v.* Morton, 22 Vt. 15; Bean *v.* Hubbard, 4 Cush. 85; Lynd *v.* Picket, 7 Minn. 184; Richards *v.* Daggett, 4 Mass. 534; Gibson *v.* Jenny, 15 Id. 205; Melville *v.* Brown, Id. 79; Howard *v.* Williams, 2 Pick. 80; Eldridge *v.* Lancy, 17 Pick. 352; Walker *v.* Fitts, 24 Id. 191; Cooper *v.* Newman, 45 N. H. 339; Foss *v.* Stewart, 14 Me. 312; Bradley *v.* Arnold, 16 Vt. 382.

[3] Henry *v.* Quackenbush, 48 Mich. 415; Rix & Stafford *v.* Silknitter, 57 Iowa, 265; Camp *v.* Chamberlain, 5 Denio, 198; McBurnie *v.* Overstreet, 8 B. Monroe, 300; Beekman & Lansing, 3 Wend. 446; Westervelt *v.* Pinckney, 14 Id. 123; Good *v.* Longmire, 35 Ala. 668; Allen *v.* McCalla, 25 Iowa, 464; Haggerty *v.* Wilbur, 16 Johns. 287.

[4] Luce *v.* Hoisington, 54 Vt. 428.

[5] Franklin *v.* Gumersell, 11 Mo. App. 306; Hewes *v.* Parkman, 20 Pick. 90; Towns *v.* Pratt, 33 N. H. 345.

effort to distinguish the one part from the other, or when the compound is of a nature to render the ingredients indistinguishable; and he must show such fact in his return.[1] He is bound to separate the defendant's from the other's portion, and to avoid the attachment of the latter, or to give it up after seizing and before making his return, if the owner thereof exibits to him satisfactory evidence of his ownership and the part claimed is susceptible of separation from the whole.[2] If the confused goods are in possession of a third person who owns them in part, the situation would be manifestly different from that where the defendant is in possession; and the officer ought not to seize the mass and take it into custody.[3] The defendant's portion could be reached by garnishment.

When the seizing officer renders himself liable to damages as a trespasser for wrongfully seizing the property of some person other than the defendant, in executing a writ of attachment, he involves his sureties also.[4]

If attached property is injured while in the custody of the officer and through his fault, he will be liable in damages to the owner, in case the plaintiff should relinquish the attachment.[5] If the seizing of it is the ground of complaint, the wrong should be charged as done to the property so as to make the officer a trespasser *ab initio;* not as done to the proceeds thereof.[6] The damages for unlawful seizure may include loss of business with respect to goods seized, costs of defence, etc.,[7] but not always attorney's fees.[8]

In most of the States, an action cannot be maintained on

[1] Sawyer *v.* Merrill, 6 Pick. 478; Morrill *v.* Keyes, 14 Allen, 222; Walcott *v.* Keith, 2 Fos. 196; Albee v. Webster, 16 N. H. 362; Wilson *v.* Lane, 33 N. H. 466.

[2] See Davis *v.* Stone, 120 Mass. 228; Shumway *v.* Rutter, 8 Pick. 443; Treat *v.* Barber, 7 Ct. 274.

[3] *Id.*

[4] Sangster *v.* Commonwealth, 17 Grat. 124; State *v.* Moore, 19 Mo. 369; People *v.* Schuyler, 4 Com. 173; Rodega *v.* Perkerson, 60 Ga. 516; Archer *v.* Noble, 3 Me. 418; Harris *v.* Hanson, 11 Id. 241; Commonwealth *v.* Stockton, 5 Mon. 192; Carpenter *v.* Dresser, 72 Me. 377; Van Pelt *v.* Littler, 14 Cal. 194; Becker *v.* Dunham, 27 Minn. 32.

[5] Becker *v.* Bailies, 44 Ct. 167.

[6] Bentley *v.* White, 54 Vt. 564.

[7] Marqueze *v.* Southeimer, 59 Miss. 430, in exposition of Miss. Code, 1880, § 2340.

[8] Patton *v.* Garrett, 37 Ark. 605.

wrongful attachment, unless there has been a decision against the plaintiff in the attachment suit.[1] If malice is charged in such action, the jury may presume it, if the party charged had no probable cause to believe the allegations he made in his affidavit to procure the attachment.[2] A judgment in favor of the creditor, sustaining the attachment made by him of the defendant's property, would obviously render a subsequent suit for damages for wrongful attachment by the attachment-defendant against the attaching creditor both unnecessary and absurd; indeed, such action could be defeated at the threshold by pleading the former judgment.

But it is not the practice in all of the States for the defendant to await the decision of the attachment suit before claiming damages for wrongful attachment. In some, the defendant may reconvene, claiming damages, when he answers in the attachment suit. This matter may be relegated to a future chapter.

[1] Swan *v.* McCracken, 7 Lea, 626. [2] Bozeman *v.* Shaw, 37 Ark. 160.

CHAPTER VI.

GARNISHING: AND ATTACHING IN THE HANDS OF THIRD PERSONS.

§ 1. Statute Provisions for Garnishment.
2. Property in the Garnishee's Hands.
3. Credits.
§ 4. Assignment, with reference to Garnishment.
5. Legal Custodians.
6. Non-resident Third Possessors.

Sec. 1. Statute Provisions for Garnishment.

The statutes are uniform in authorizing the attachment of the defendant's credits and property in the possession of other persons. There is not entire uniformity of method, nor is the authorization so liberal in some of the States as it is in most of them. It will be found convenient to present the subject first with reference to the method most generally employed; and then notice some exceptional peculiarities, though they are governed by the same principles.

It is generally *under the writ of attachment* that third persons are summoned as garnishees to answer under oath. Not only that writ, but the affidavit and bond supporting it suffice for the purposes of the garnishment; that is, no additional writ, affidavit and bond are required ordinarily to have property attached in a third person's hands. The writ, having reference to no particular property, includes what the debtor owns but does not possess as well as what he possesses and owns. The process is served, not by physically seizing the property which the garnishee has, and thus disturbing his lawful possession, but by attaching it in his hands, and summoning him to answer under oath whether he holds any of the defendant's property or credits, and what he holds, with the necessary particulars. He is summoned to submit to an examination. The attachment

takes place when the summons is served, if, upon examination, it is ascertained that the garnishee then possessed attachable things belonging to the defendant.[1]

Instead of following the summons with an examination in court upon the garnishee's appearance, written interrogatories are served upon him with the summons, in many of the States.

In Iowa, the interrogatories are prescribed, and the sheriff may take the sworn answers of the garnishee. Should the latter refuse or fail to respond, he may be summoned into court for examination as in the manner above mentioned. In the other States where interrogatories are served, the questions are usually prepared by the plaintiff, and the garnishee is summoned to answer them under oath. The lien thus created dates from the service of the summons and interrogatories, (if it turns out that the garnishee has something attachable as the defendant's.) Indeed, the examination by means of written interrogatories differs so slightly from the examination by questions orally put, that it will not be necessary to distinguish hereafter between the two practices when treating of the answers of the garnishee. The principles applicable to the one form of examination apply equally to the other, except slight peculiarities which are not confined to evidence in the class of suits herein considered.

Under either form, the garnishee is questioned as a party rather than a witness. His position is as though he were directly sued and put to his oath by his own creditor. One who cannot be required to testify as a witness may be obliged to answer as a garnishee. A wife may be garnished in a suit against her husband and defaulted for refusing to answer, when not liable to be made a witness against him.[2] The examination of the garnishee is however governed by the rules of evidence so far as they are applicable.

In Florida, a copy of the writ or warrant of attachment, with notice that the property and credits of the defendant in the garnishee's hands are attached, are left with the garnishee, who is required to furnish the sheriff with a description of such property and credits; and, in default thereof, he is summoned to

[1] Conley *v.* Chilcote, 25 Ohio St. 320. [2] Thompson *v.* Silvers, 59 Iowa, 670.

answer on oath in court. In New York, too, the garnishee must certify to the sheriff in like manner, or be subjected to examination under oath. If a certificate has been given, he may yet be examined, when the plaintiff has made affidavit that the certificate is untrue. In both the Carolinas, the sheriff, under the writ of attachment, is authorized to collect directly of third persons what debts they may owe the defendant, and to attach what property they may hold, liable to execution on the plaintiff's demand; and that officer may institute action against them, in his own name or in that of the attachment-debtor, to effect such purposes.

No separate writ is ordinarily employed when third persons are to have the defendant's property and credits attached in their hands, though sometimes one called the "writ of garnishment" is issued, as in Arkansas and Texas. Under this writ, garnishees are summoned to answer on oath, and the practice conforms to that in most general use.

A special affidavit is required in order to garnishment in several of the States. In Kansas, Michigan, Minnesota and Nebraska, the plaintiff, wishing to attach his debtor's property or credits possessed by designated third persons, must swear that he believes and has reason to believe that they owe the defendant or have property of his. In New Jersey, the required oath is that the affiant believes the third persons who have denied liability before the auditor, have money or goods belonging to the defendant, or are indebted to him; and that the affiant fears they will abscond before execution can be obtained. In Wisconsin, the affidavit is much like that required in Kansas, Michigan, etc. It is delivered to the sheriff, who must summon the garnishee to answer, under oath, such interrogatories as may be propounded, unless the property held by such third persons may be immediately attached without further examination.

The exceptional character of the practice is not in the requirement of an affidavit, (for all the States require that where attachment is an extraordinary process,) but in prescribing a peculiar one for garnishment. The affidavit made to get the attachment writ sent out on a fishing commission to catch any

of the debtor's property, suffices for garnishment in the other States.

When there is no other attachment proceeding but that of garnishment and the constructive seizure of property or credits in the hands of a third person, both affidavit and bond become necessary. Where the ancillary proceeding is separate from the main action, the bond may be required in that proceeding.[1] The defendant in the principal suit ought to be the obligee of the bond; and the garnishee is entitled to a bond, under some statutes, where he is to be immediately deprived of his possession.

Formerly it was the general practice, that garnishees could not be summoned to answer unless the sheriff had failed to find, in the defendant's possession, property sufficient to satisfy the plaintiff's demand; and this practice is not everywhere abandoned.

The trustee process, employed in the New England States, especially in Maine, Massachusetts, New Hampshire and Vermont, reaches the property and credits of the defendant, held by third persons, much in the same way as in the other States, under the process of garnishment.

It will be seen that the differences in the practice, in the several States, is so slight that the subject of attachment in the hands of third persons may be generally treated. Nothing need be here said further of the service of the summons with a copy of the writ of attachment. The service is effected as in ordinary cases, and due return thereof made to the court. The garnishee cannot accept service.[2] The attaching creditor furnishes the names of the persons to be garnished, and the sheriff proceeds to execute the writ without any unusual formality; but he must conform to the statute.[3]

When interrogatories must be prepared by the plaintiff and filed in the record, prior to the summons, the names of those

[1] Burton *v.* Wynne, 55 Ga. 615.

[2] Schindler *v.* Smith, 18 La. Ann. 476; Hebel *v.* Amazon Ins. Co. 33 Mich. 400. May accept when no rights of opposing creditors are involved: Freeman *v.* Miller, 51 Tex. 443. See North Central R. R. Co. *v.* Rider, 45 Md. 24.

[3] Norvell *v.* Porter, 62 Mo. 309.

to be interrogated must be inserted therein, and each garnishee must be served with a copy. The method of procedure and the general principles by which a knowledge of the garnishee's relations to the debtor are ascertained will be presented in the chapter on Charging the Garnishee.

Sec. 2. Property in the Garnishee's Hands.

Actual possession of defendant's property subject to execution for his debt renders the possessor liable as a garnishee.[1] It must be under control so that he be capable of turning it over on judicial demand. Mere possession, without authority or right derived from the defendant, directly or indirectly, to hold the property for him might give the right of direct attachment, but would give the possessor no legal control over it and no right to turn it over. Whether, in such case, he is amenable as garnishee must depend on circumstances. If without authority, but by the sufferance of the owner he holds, he ought to be amenable to the process.[2] If the possession of property is temporary, as that of a hotel keeper in charge of a guest's baggage, or that of a man who has hired a horse for a ride, or that of one who has an article on trial with the view of purchasing it, such actual possession ought not to subject the holder to garnishment, but such articles should be deemed in possession of the owner and liable to direct seizure and detention as his.

On the other hand, though not in actual possession, the right to possess has been thought to render the third person, having such right, amenable to the process;[3] but this supposition must not be received without considerable qualification.

Possession by the garnishee must be accompanied with privity between the defendant and himself, of such character as to give the defendant the right to recover possession as owner. In other words, the garnishee's possession must really be that of

[1] Jones *v.* Crews, 64 Ala. 368; Andrews *v.* Ludlow, 5 Pick. 28; Burrell *v.* Letson, 1 Strobhart, (S. C.) 239; Estabrook *v.* Earle, 97 Mass. 302.

[2] Buddig *v.* Simpson, 33 La. Ann. 375.

[3] Morse *v.* Holt, 22 Me. 180; Lane *v.* Nowell, 15 Me. 86.

the defendant-owner, since he must hold for the owner. If the relation between the two is such that the owner cannot regain his own, it follows that the plaintiff in an attachment suit against him cannot reach the third person who is in possession, since such attaching creditor cannot have greater rights and privileges, towards the property so held, than the debtor himself, unless the latter has been estopped by his own fraudulent transfer from asserting his right.[1]

The privity between the debtor and his debtor, or between the defendant-owner and the third person in possession, necessary to the legal existence of garnishment, relates both to interest and contract. The defendant may be entitled to regain possession of property or money from his agent or from any person holding it, yet not have any proprietorship vested in himself. He may have a right of action for its recovery, yet the recovery may be for the use of another person. He may have what is technically called "the legal title," yet he may be only the trustee of some real owner. An executor, administrator, guardian, tutor, factor, common carrier, etc., may legally have the right to regain possession of money or goods from the hands of a third person, yet, as they are not the owners of the property or money belonging to them for administrative purposes only, it cannot be subjected to the process of garnishment in any attachment suit against any one of them for his own indebtedness. A factor receives a consignment of cotton from a planter for sale; he entrusts it to an agent for some purpose; he has the right to re-claim possession: why may not the cotton be subjected to garnishment, and the sub-agent be made a garnishee, in an attachment suit brought by a creditor of the factor? Evidently because the factor does not own the cotton, and it cannot be made to pay his debt. Here is a case where privity of interest between the defendant and the garnishee is wanting. Equally plain illustrations might be drawn from the case of

[1] National Bank of Missouri *v.* Stanley, 9 Mo. App. 146; Skowhegan Bank *v.* Farrer, 46 Me. 293; Balt. & O. Ry. Co. *v.* Wheeler, 18 Md. 372; Armor *v.* Cockburn, 4 Martin, N. S. (La.) 667; Burnside *v.* McKinley, 12 La. Ann. 505; Lundie *v.* Bradford, 26 Ala. 512; Cairo &c. R. R. *v.* Killenberg, 82 Ill. 295; Fitzgerald *v.* Hollingsworth, 14 Neb. 188.

administrators and others above mentioned, when third persons are sought to be made garnishees because of temporary possession of money or property which may be reclaimed by such trustees but not in the capacity of owners. The case of auctioneers who sell for sheriffs or other executive officers, and receive the proceeds of the sale to be handed over to their principals, may serve to illustrate want of privity, should they be served as garnishees; for they are in no sense the agents of those whose property is sold; have no relation with such former owners, and are therefore not chargeable as having in possession money and goods of such prior owners.[1]

There may be privity of interest without the property being liable to garnishment. Property may be held by a third person in trust for the real owner, under such terms of contract, or under such operation of law, that a creditor of the owner cannot attach it in the hands of the trustee.

One who has promised to deliver property in payment, (for instance, a certain number of bales of cotton,) cannot be made garnishee in a suit against the person to whom the goods are to be delivered; that is, the cotton could not be attached in the hands of such third person as the property of the defendant.[2] One who has returned stock-certificates for re-transfer to their owner, on the books of the company, cannot be garnished as

[1] Penniman *v.* Ruggles, 6 Mass. 166; Casey *v.* Davis, 100 Id. 124; Wells *v.* Banister, 4 Id. 514; Richardson *v.* Whiting, 18 Pick. 530; Chapin *v.* Ct. R. R. Co. 16 Gray, 69; Barnard *v.* Graves, 16 Pick. 41; Brigden *v.* Gill, 16 Mass. 522; White *v.* Jenkins, Id. 62; Burnham *v.* Beal, 14 Allen, 217; Field *v.* Crawford, 6 Gray, 116; Falsom *v.* Haskell, 11 Cush. 470; McIlvaine *v.* Lancaster, 42 Mo. 96; Neuer *v.* O'Fallon, 18 Id. 277; Briggs *v.* Block, Id. 281; Haust *v.* Burgess, 4 Hughes, 560; Kelly *v.* Babcock, 49 N. Y. 318; Kelly *v.* Roberts, 40 Id. 432; Stinson *v.* Caswell, 71 Me. 510; Titcomb *v.* Seaver, 4 Me. 542; Sweet *v.* Read, 12 R. I. 121; Jones *v.* Etna Ins. Co. 14 Ct. 501; Elmer *v.* Welch, 47 Id. 56; Towne *v.* Griffith, 17 N. H. 165; Bean *v.* Bean, 33 Id. 279; Pickering *v.* Wendell, 20 Id. 222; Walker *v.* Detroit, Grand Haven, &c., R. R. Co. 49 Mich. 446; Eichelberger *v.* Murdock, 10 Md. 373; Mattingly *v.* Grimes, 48 Id. 102; Jones *v.* Crews, 64 Ala. 368; Huntley *v.* Stone, 4 Wis. 91; Simpson *v.* Harry, 1 Dev. & Bat. (N. C.) 202; Center *v.* McQuesten, 24 Kan. 480; Miller *v.* Richardson, 1 Mo. 310; Swan *v.* Summers, 19 W. Va. 115; Halpin *v.* Barringer, 26 La. Ann. 170; Hartman *v.* Olvera, 54 Cal. 61; Meadowcroft *v.* Agnew, 89 Ill. 469.

[2] Jones *v.* Crews, 64 Ala. 368.

the possessor of the stock, though summoned before the transaction has been signed by him and entered on the books.[1]

Land owned by the attachment debtor, but in the possession of a third person, is not subject to garnishment, as a general rule; the ordinary method is to attach it constructively by giving notice of seizure to the tenant in possession, and returning it as attached. It is not subject to the process of garnishment unless expressly made so by statute.[2]

Sec. 3. Credits Attached in the Garnishee's Hands.

Garnishment will not be maintainable on the ground that the garnishee is indebted to the defendant, unless the debt is payable in money and the defendant has right of action, present or maturing, to recover the money. It must be certain—not depending upon contingency—not for unliquidated damages.[3] There may be doubt as to minor questions affecting the relation between the garnishee and the defendant, but the indebtedness of the former to the latter must be certain to enable the creditor of the latter to reach it by garnishment. There must be no condition precedent, no impediment of any sort between the garnishee's liability and the defendant's right to be paid, such as the attaching creditor himself cannot remove. Nobody must be injured: the situation must be such that the garnishee can get full acquittance of his obligation by paying into court under the garnishment; that the defendant can be virtually paid by having his own debt paid; and that the attaching creditor can have his demand satisfied without injury to any person or to the public at large.[4]

A debt not due is not uncertain and contingent by reason of its immaturity. The garnishee cannot be made to pay it before

[1] Cooke *v.* Hallett, 119 Mass. 148.

[2] How *v.* Field, 5 Mass. 390; Dickinson *v.* Strong, 4 Pick. 57; Repley *v.* Severance, 6 Pick. 474; Gore *v.* Clisby, 8 Pick. 555; Bissell *v.* Strong, 9 Pick. 562; Chapman *v.* Williams, 13 Gray, 416; Moor *v.* Towle, 38 Me. 133; Stedman *v.* Vickery, 42 Me. 132; Plummer *v.* Rundlett, 42 Me. 365; Baxter *v.* Currier, 13 Vt. 615; Wright *v.* Bosworth, 7 N. H. 590; Risley *v.* Welles, 5 Ct. 431; Seymour *v.* Kramer, 5 Iowa, 285. See Dressor *v.* McCord, 96 Ill. 389.

[3] Gove *v.* Varrell, 58 N. H. 78.

[4] Jones *v.* Crews, 64 Ala. 368.

maturity but it may be subjected to garnishment when there is statutory authority therefor. The indebtedness however must exist; the establishment of liability arising after garnishment is not sufficient.[1]

To hold the garnishee it must appear that he was indebted to the principal defendant when the proceeding against him was instituted.[2] He is not indebted during the pendency of a suit against him for libel, instituted by an attachment defendant, and is not chargeable as garnishee by the attachment plaintiff, till judgment for libel has been rendered.[3]

If the maker of a negotiable promissory note is summoned as the garnishee of the payee or endorser, the attaching plaintiff is not entitled to judgment, (it has been held,) if the note was transferred either before or after the service of the attachment, provided the transferee acquired without notice of the attachment and gave value for the note.[4]

Garnishees having pleaded *non-assumpsit* for the defendants and *nulla bona* for themselves, the defendants appeared and confessed judgment. The garnishees then pleaded that a receiver had been appointed for the defendants, and that the indebtedness of the garnishees was therefore to the receiver; but the plaintiff successfully demurred.[5] The recognition, by a garnishee, of the validity of an assignment, proves the relation of debtor and creditor between him and the assignor.[6]

[1] Hitchcock *v.* Miller, 48 Mich. 603; Hopson *v.* Dinan, Id. 612; Kimball *v.* Macomber, 50 Mich. 362.

[2] Hopson *v.* Dinan, 48 Mich. 612; Hitchcock *v.* Miller, Id. 603; Kraft *v.* Raths, 45 Mich. 20; Bishop *v.* Young, 17 Wis. 46; Conway *v.* Ionia Circuit Judge, 46 Mich. 28. In the last case, held that "where proceedings in garnishment are based upon an affidavit that is jurisdictionally defective, but the garnishee appears and discloses assigned claims in which he has no personal interest, it is within the court's discretion to dismiss the proceedings on motion made by the garnishee, before judgment is entered in the principal case, especially if the affidavit is not amended after notice to dismiss, and the garnishee's conduct has not caused prejudice."

[3] Detroit Post & Tribune Co. *v.* Reilly, 46 Mich. 459.

[4] Cruett *v.* Jenkins, 53 Md. 217. See Robertson *v.* Baker, 10 B. J. Lee, 300.

[5] Bartlett *v.* Wilbur, 53 Md. 485.

[6] Id.

One who has been legally authorized to collect the dues of a partnership firm and distribute them *pro rata* among their creditors in payment of debts due by the firm, cannot be made to violate his trust, or be defeated in the performance of it, by being made garnishee in an attachment suit afterwards brought by one of the creditors.[1] If a garnished debtor of the firm, ignorant of the assignment, acknowledges indebtedness, he should be allowed to correct his answer. Garnishment, under such circumstances, cannot defeat the assignment.[2]

Funds held in trust are subject to the process if the relation of the defendant to them is such that he may recover possession of them as his own, at will,[3] but not otherwise, though the holder may have deposited them in bank in his own name. If a sheriff should deposit in bank trust funds, or money collected in his official capacity for different judgment creditors, the act would not be a conversion of the funds so as to make them garnishable for his own debt, though the deposit be in his own name.[4] He may defend and show this, though the bank, as garnishee, acknowledges the deposit to be held in the officer's individual name.[5] The *onus* is on the garnishee, however, to show that what he acknowledges to hold is in trust, where such answer may be traversed; and a deed of assignment made in another State, and not shown to be valid, has been held insufficient for the purpose,[6] though this seems against the general

[1] Haust *v.* Burgess, 4 Hughes, 560.

[2] Sweet *v.* Read, 12 R. I. 121.

[3] McLaughlin *v.* Swann, 18 How. 217; Silverwood *v.* Bellar, 8 Whar. 420; Bank of Northern Liberties *v.* Jones, 42 Pa. St. 536; Jackson *v.* Bank of U. S. 10 Id. 61; Park *v.* Matthews, 36 Pa. St. 28; Huntington *v.* Risden, 43 Iowa, 517; Cook *v.* Dillon, 9 Iowa, 407; Haskell *v.* Haskell, 8 Met. (Mass.) 545; Stevens *v.* Bell, 6 Mass. 339; Davis *v.* Marston, 5 Id. 199; Pierson *v.* Weller, 3 Mass. 564; New England Ins. Co. *v.* Chandler, 16 Id. 275; Richards *v.* Allen, 8 Pick. 405; Webb *v.* Peele, 7 Id. 247; Tucker *v.* Clisby, 12 Id. 22; Williams *v.* Reed, 5 Id. 480; Watkins *v.* Otis, 2 Id. 88; Raynes *v.* Lowell, etc. Society, 4 Cush. 343; Sparhawk *v.* Cloon, 125 Mass. 263; Daniels *v.* Eldredge, Id. 356; Wells *v.* Hawes, 123 Mass. 97; Hearn *v.* Crutcher, 4 Yerg. 461; Thompson *v.* Stewart, 3 Ct. 171; Emery *v.* Davis, 17 Me. 252; Edson *v.* Trask, 22 Vt. 18.

[4] Meadowcroft *v.* Agnew, 89 Ill. 469.

[5] Id.

[6] Frank *v.* Frank, 6 Mo. App. 588; Horton *v.* Grant, 56 Miss. 404.

doctrine that the burden of disproving the garnishee's answer, when traversable, rests on the garnishing party.[1]

A deposit to the credit of a second person to whom the bank acknowledges indebtedness by a certificate, may be subjected to garnishment in the hands of the bank as his debtor, in a suit against him.[2]

A depositor cannot escape the danger of having the deposit attached in the hands of the bank as his, if he makes the deposit fraudulently in the name of another. Though he be a public officer, and deposit a fund which he holds in trust, it would not lie in his mouth afterwards to say that the fund was not his private money liable to attack by his creditors, if the deposit had been made in contravention of law.[3] The public fund thus deposited could be claimed in the suit of attachment, by the state, city, county or whatsoever corporation might be the owner; but he could not complain if the fund should be taken by his creditors and he be afterwards made to account as a public officer for all that had come into his hands.

It is only the defendant's property and credits which can be reached by the process of garnishment—not the property and credits which he has in trust for others. Such property may be in the hands of agents for various purposes connected with the trust, but those agents cannot be made garnishees in a suit against the defendant on his own account.[4]

Money deposited with the clerk of a court as security for an appeal remains the money of the depositor subject to the contingency of answering the claim of the appellee in case the appellant should be adjudged against; and it is therefore garnishable.[5] But the creditor cannot disturb the deposit till all liability of its being required for the purpose for which it is placed with the clerk shall have passed; till the money becomes

[1] Rippen *v.* Schoen, 92 Ill. 229.

[2] Exchange Bank *v.* Gulick, 24 Kan. 359; Nichols *v.* Goodheart, 5 Ill. App. 574.

[3] South Bend Bank *v.* Gandy, 11 Neb. 431.

[4] Lackland *v.* Garesche, 56 Mo. 267; McIlvaine *v.* Lancaster, 42 Id. 96; White *v.* White, 30 Vt. 338; Hewitt *v.* Wheeler, 22 Ct. 557; Keyser *v.* Mitchell, 67 Pa. St. 473; Hall *v.* Williams, 120 Mass. 344.

[5] Dunlop *v.* Patterson Fire Ins. Co. 74 N. Y. 145.

susceptible of application to the debt due the creditor without injury to any other person.

The proceeds of land sold by a trustee under a decree of court, and distributed so far as the ratification of the auditor's account, and paid into court under judicial order, and deposited in bank to the credit of the cause, cannot be subjected to garnishment as still in the hands of the trustee; nor can any part of it.[1]

If possession is merely constructive, the possessor cannot be garnished.[2] Possession by the garnishee is not deemed constructive in such a sense as to make him unchargeable, when he holds by a clerk or other agent.[3] What his agent holds, he holds; and he is amenable to the process, in a suit against the defendant-owner. This is apparent in consideration of the fact that those who hold under him and for him are not garnishable because of such possession in a suit against their immediate principal, for the manifest reason that the funds are not his.[4]

When the owner of property or credits in a third person's hands cannot sue without the performance of some condition, such third person cannot be made a garnishee at the suit of a creditor of the owner against the owner.[5] The garnishee may answer that he has nothing deliverable to the defendant, or over which the latter has control. But if only a notice or some slight preliminary action is requisite on the part of the owner to gain possession of goods or to render a credit actionable, his creditor may summon the third person holding or owing and hold him as garnishee.[6] The difference is between the existence of a condition precedent to owning, and a condition precedent to right of possession. It is when a condition of the latter

[1] Maltingly *v.* Grimes, 48 Md. 102.

[2] Nickerson *v.* Chase, 122 Mass. 296; Andrews *v.* Ludlow, 5 Pick. 28.

[3] Nichols *v.* Goodheart, 5 Ill. App. 574; Ward *v.* Lamson, 6 Pick. 358; McDonald *v.* Gillet, 69 Me. 271; Childs *v.* Digby, 24 Pa. St. 23.

[4] Muith *v.* Schardin, 4 Mo. App. 403; Farmers' &c. Nat. Bank *v.* King, 57 Pa. St. 202; McCormac *v.* Hancock, 2 Id. 310; Jones *v.* Bank of Northern Liberties, 44 Id. 253; Wright *v.* Foord, 5 N. H. 178.

[5] Curtis *v.* Alvord, 45 Ct. 569; Williams *v.* Young, 46 Iowa, 140; Maduel *v.* Mousseaux, 29 La. Ann. 228.

[6] Ware *v.* Gowen, 65 Me. 534; Zimmer *v.* Davis, 35 Mich. 39.

sort is the only obstacle that the creditor may disregard it and hold the garnishee.

Contingent liability affords no ground for garnishment.[1] Where indebtedness not only depends upon conditions but is to be novated when it shall become due by drafts payable to the garnishee and endorsed by him to the defendant, it cannot be subjected to garnishment.[2]

The general rule is that the garnishee is not chargeable unless the defendant could recover of him what the plaintiff seeks to secure by garnishment.[3] Nor is he chargeable on contingent liability to the defendant in damages, though the latter may have a good cause of action and the damages may be recoverable.[4]

Where the damages arise *ex contractu* and are certain and

[1] Hearne *v.* Keath, 63 Mo. 84.

[2] Larrabee *v.* Walker, 71 Me. 441.

[3] Victor *v.* Hartford Insurance Co. 33 Iowa, 210; Webster *v.* Steele, 75 Ill. 544; Pierce *v.* Carlton, 12 Id. 358; Davis *v.* Pawlette, 3 Wis. 300; Lewis *v.* Smith, 2 Cr. C. C. 571; Geer *v.* Chapel, 11 Gray, 18; Fellows *v.* Duncan, 13 Met. Mass. 332; Maine &c. Ins. Co. *v.* Weeks, 7 Mass. 438; White *v.* Jenkins, 16 Id. 62; Brigden *v.* Gill, Id. 522; Caldwell *v.* Coates, 78 Pa. St. 312; Rundlet *v.* Jordan, 3 Me. 47; Hoyt *v.* Swift, 13 Vt. 129; Morey *v.* Sheltus, 47 Vt. 342; Hutchins *v.* Hawley, 9 Id. 295; Kettle *v.* Harvey, 21 Id. 301; Cobb *v.* Bishop, 27 Id. 624; Haven *v.* Wentworth, 2 N. H. 93; Adams *v.* Barrett, Id. 374; Piper *v.* Piper, Id. 439; Greenleaf *v.* Perrin, 8 N. H. 273; Paul *v.* Paul, 10 Id. 117; Paul *v.* Reed, 52 Id. 136; Patton *v.* Smith, 7 Iredell, 438; Cook *v.* Walthall, 20 Ala. 334; Harrell *v.* Whitman, 19 Id. 135; Mims *v.* Parker, 1 Ala. 421; Foster *v.* Walker, 2 Ala. 177; Hall *v.* Magee, 27 Ala. 414; Lundie *v.* Bradford, 26 Id. 512; Nesbitt *v.* Ware, 30 Id. 68; Powell *v.* Sammons, 31 Id. 552; Lewis *v.* Dubose, 29 Id. 219; McGehee *v.* Walke, 15 Id. 183; Walke *v.* McGehee, 11 Id. 273; Jones *v.* Crews, 64 Ala. 368; Pressnall *v.* Mabray, 3 Porter, 105; Smith *v.* Chapman, 6 Id. 365; Allen *v.* Morgan, 1 Stewart, 9; Williams *v.* Gage, 49 Miss. 777; Turner *v.* Armstrong, 9 Yerg. 412; Wetherill *v.* Flanagan, 2 Miles, 243; Bridges *v.* North, 22 Ga. 52; Estill *v.* Goodloe, 6 La. Ann. 122.

[4] Hemmenway *v.* Pratt, 23 Vt. 332; Barker *v.* Esty, 19 Id. 131; Fish *v.* Field, Id. 141; Lomerson *v.* Huffman, 1 Dutch. 625; Foster *v.* Dudley, 10 Fos. 463; Boardman *v.* Roe, 13 Mass. 104; Thayer *v.* Southwick, 8 Gray, 229; Rand *v.* White Mountain R. R. 40 N. H. 79; McKean *v.* Turner, 45 Id. 203; Despatch Line *v.* Bellamy Manf. Co. 12 Id. 205; Getchell *v.* Chase, 37 Id. 106; Leefe *v.* Walker, 18 La. 1; Peet *v.* McDaniel, 27 La. Ann. 455; Ransom *v.* Hays, 39 Mo. 445; Graham *v.* Moore, 7 B. Mon. 53; Hugg *v.* Booth, 2 Iredell, 282; Deaver *v.* Keith, 5 Id. 374.

due, they may be reached.[1] Contingent liability on contract affords no ground for garnishment.[2] A certain liability is sufficient though the debt be payable in future.[3] But this is not invariable practice.[4]

Wages and salaries, when exempt from direct execution by garnishment after judgment, are also exempt from attachment garnishment.[5]

A debtor of defendant, who has contracted to pay to another person, is not liable to garnishment in the suit of another

[1] Girard Fire Ins. Co. *v.* Field, 45 Pa. St. 129; Boyle *v.* Franklin Fire Ins. Co. 7 Watts & Serg. 76; Franklin Fire Ins. Co. *v.* West, 8 Id. 350; Knox *v.* Protection Ins. Co. 9 Ct. 430; Northwestern Ins. Co. *v.* Atkins, 3 Bush, 328.

[2] Williams *v.* Railroad Co. 36 Me. 201; Ives *v.* Vanscoyoc, 81 Ill. 120; Bishop *v.* Young, 17 Wis. 46; Bates *v.* New Orleans &c. R. R. Co. 4 Abb. Pr. 72; Clement *v.* Clement, 19 N. H. 460; Sayward *v.* Drew, 6 Me. 263; Roberts *v.* Drinkard, 3 Met. (Ky.) 309; Maduel *v.* Mousseaux, 29 La. Ann. 228; Russell *v.* Clingman, 33 Miss. 535; Williams *v.* Marston, 3 Pick. 65; Guild *v.* Holbrook, 11 Pick. 101; Faulkner *v.* Waters, Id. 473; Taber *v.* Nye, 12 Id. 105; Rick *v.* Waters, 22 Id. 563; Wentworth *v.* Whittemore, 1 Mass. 471; Davis *v.* Ham, 3 Id. 33; Frothingham *v.* Haley, Id. 68; Willard *v.* Sheafe, 4 Id. 235; Wood *v.* Partridge, 11 Id. 488; Grant *v.* Shaw, 16 Id. 341; Hancock *v.* Colyer, 99 Id. 187; Wood *v.* Buxton, 108 Id. 102; Potter *v.* Cain, 117 Id. 238; Meacham *v.* Corbitt, 2 Met. (Mass.) 252; Coburn *v.* Hartford, 38 Ct. 290; Strauss *v.* Railroad Co. 7 W. Va. 368; Martz *v.* Detroit Ins. Co. 28 Mich. 201; Thorp *v.* Elliott, 42 Mich. 201; Katz *v.* Sorsby, 34 La. Ann. 588.

[3] King *v.* Vance, 46 Ind. 246; Cottrell *v.* Varnum, 5 Ala. 229; Branch B'k *v.* Poe, 1 Id. 396; Dunnegan *v.* Byers, 17 Ark. 492; Fay *v.* Smith, 25 Vt. 610; Sayward *v.* Drew, 6 Me. 263; Willard *v.* Sheafe, 4 Mass. 235; Steuart *v.* West, 1 Harr. & J. 536; Fulweiler *v.* Hughes, 17 Pa. St. 440; Walker *v.* Gibbs, 2 Dall. 211; Peace *v.* Jones, 3 Murphy, 256.

[4] McMinn *v.* Hall, 2 Tenn. 328; Childress *v.* Dickens, 8 Yerg. 113; Thorp *v.* Preston, 42 Mich. 511, with reference to future rents: Ordway *v.* Remington, 12 R. I. 319 as to the time when rents became garnishable; Jones *v.* Crews, 64 Ala. 368: future payment in cotton.

[5] Wages not yet due, and ten dollars of those due in each case, are exempt from garnishment in Maryland, Md. Code, Art. 10, § 36; House *v.* Baltimore & Ohio R. R. Co. 48 Md. 130. Salaries of public officers cannot be subjected to garnishment in Alabama, though § 2948 of its Revised Code, provides for the attachment of money in the hands of a sheriff or other officer. Pruitt *v.* Armstrong, 56 Ala. 306. Funds which are exempt from garnishment may be ordered to be paid to the debtor, on motion, after notice, and the garnishee may be discharged. Williamson *v.* Harris, 57 Ala. 40. Wages liable in Ga. in a suit for provisions furnished, notwithstanding

creditor against the defendant, when it appears that no demand has been made by the latter subsequent to such contract.[1] The purchaser of mortgaged property does not become indebted to the mortgagee though he may have promised the vendor that he would pay the mortgage debt, and though the property remains bound; and hence an attachment creditor in a suit against the mortgagee cannot make the purchaser a garnishee.[2]

A mortgagee, in possession of mortgaged chattels, is held to be not garnishable for what they may be worth beyond the amount of the mortgage.[3] A judgment-debtor may be garnished, after his appeal, if no supersedeas bond has been filed;[4] but money due on a decree of a court of equity has been held not liable to attachment.[5]

What is due a partnership cannot be subjected to garnishment as a credit due one of the firm.[6] In an attachment suit against

pending of prior garnishment. Dunlap *v.* Hooper, 67 Ga. 721. In Wisconsin, the statute exempting sixty days' earnings of a debtor who has a family to support, is inapplicable to non-resident debtors. Commercial Bank *v.* Chicago, M. & St. P. R. R. Co. 45 Wis. 172. In New York, sixty days' wages are exempt. McCullough *v.* Carragan, 24 Hun. 157. In Maryland, all beyond a hundred dollars of wages due may be attached. Hagerstown Bank *v.* Weckler, 52 Md. 30. See Iowa Code, § 3074, Shelly *v.* Smith, 59 Iowa, 453. In Moore *v.* Chicago, &c. R. R. Co. 43 Iowa, 385, a railroad company was held not bound to plead, when summoned as garnishee in Mo. that a R. R. employee's wages are exempt in Iowa. Wages of guests upon which the hotel keeper has a lien by statute cannot be subjected to garnishment. Rischert *v.* Kunz, 9 Mo. App. 283. Wages to the amount of twenty-five dollars are exempt in Illinois. Chicago, &c. R. R. Co. *v.* Ragland, 84 Ill. 375; Bliss *v.* Smith, 78 Ill. 359; whether the debtor is a resident or not, if he is the head of a family. Mineral Point R. R. Co. *v.* Barron, 83 Ill. 365. In Ohio, three months' wages are exempt, if necessary for family support. Snook *v.* Snetzer, 25 Ohio St. 516. In Massachusetts, the wages of a seaman on an Atlantic coasting voyage are not exempt. White *v.* Dunn, 134 Mass. 271. But owners of a coasting vessel, summoned as trustees of seamen, will not be charged if they have already been condemned to pay the wages to another claimant, by a decree in admiralty. Eddy *v.* O'Hara, 132 Mass. 56.

[1] Elmer *v.* Welch, 47 Ct. 56; Center *v.* McQuesten, 24 Kan. 480; Stinson *v.* Caswell, 71 Me. 510.

[2] Hartman *v.* Olvera, 54 Cal. 61.

[3] Dieter *v.* Smith, 70 Ill. 168.

[4] Phillips *v.* Germon, 43 Iowa, 101.

[5] Black *v.* Black, 32 N. J. Eq. 74.

[6] Williams *v.* Gage, 49 Miss. 777; Mobley *v.* Loubat, 7 How. (Miss.) 318; Ford *v.* Detroit Dry Dock Co. 50 Mich. 358; Winston *v.* Ewing, 1

him, a debtor to the partnership cannot be made a garnishee. Such debtor owes nothing to any one member of the firm.

If a suit is brought against a member of a firm to whom the firm is indebted, what is due him may be garnisheed, provided the garnished partners be within the jurisdiction.[1] A creditor may levy upon the interest of one partner in tangible property belonging to the partnership,[2] but a demand due in part only to the principal defendant cannot be made the subject of garnishment.[3]

As a debt due a firm cannot be reached by the garnishment of the debtor in a suit against one of the partners, the court cannot, in such suit, compel the other partners to appear.[4] But, in a suit against a firm, the debtor of a partner, or rather the holder of money belonging to a partner, was held garnishable.[5]

It is held that a joint debt cannot be subjected to garnishment if there is service on but one of the debtors;[6] but otherwise if the debt be joint and several.[7] If one of the joint and several obligors be garnished, another who is not may pay the debt to the defendant and thus relieve the garnishment.[8]

The answer of a garnishee acknowledging indebtedness to a firm of which the defendant is a member, but denying indebtedness to the defendant, would not bind him. There would be no valid garnishment; the debt due the firm would not be attached,

Ala. 129; Kingsley *v.* Mo. Fire Co. 14 Mo. 467; Sheedy *v.* Second Nat. Bank, 62 Id. 17; Church *v.* Knox, 2 Ct. 514; Atkins *v.* Prescott, 10 N. H. 120; Towne *v.* Leach, 32 Vt. 747; Barry *v.* Fisher, 39 How. Pr. 521.

[1] Myers *v.* Smith, 29 Ohio St. 120.

[2] Id; Nixon & Chatfield *v.* Nash & Atkinson, 12 Ohio St. 648.

[3] Markham *v.* Gehan, 42 Mich. 74.

[4] Myers *v.* Smith, 29 Ohio St. 120; Sheedy *v.* Second National Bank, 62 Mo. 17; Sweet *v.* Read, 12 R. I. 121.

[5] Pearce *v.* Shorter, 50 Ala. 318; Stevens *v.* Perry, 113 Mass. 280.

[6] Hirth *v.* Pfeifle, 42 Mich. 31; Wellover *v.* Soule, 30 Id. 481; Hoskins *v.* Johnson, 24 Ga. 625; Wilson *v.* Albright, 2 G. Greene, 125; Pettes *v.* Spalding, 21 Vt. 66; Rix *v.* Elliott, 1 N. H. 184; Hudson *v.* Hunt, 5 Id. 538; Atkins *v.* Prescott, 10 Id. 120; Ellicott *v.* Smith, 2 Cr. C. C. 543.

[7] Macomber *v.* Wright, 35 Me. 156; Travis *v.* Tartt, 8 Ala. 574; Speak *v.* Kinsey, 17 Tex. 301.

[8] Jewett *r.* Bacon, 6 Mass. 60. See Hawley *v.* Atherton, 39 Ct. 309; Sabin *v.* Cooper, 15 Gray, 532.

since only one member of it is defendant in the attachment suit.[1] But, after such answer, the attaching creditor may amend his writ by making the other partner or partners of the firm defendants also, so as to bring into court the firm itself; and then, if the garnishee or trustee still holds funds of theirs, or owes them a debt, he will be bound by his answer already given, and the attachment will be valid.[2]

If some of the members of a firm are non-residents, and garnishment is directed against all but only the residents are served, it has been held that the firm is bound as garnishee.[3]

The obligation of the maker of a negotiable note is to the holder; and though he, as garnishee, may answer that the defendant was the holder when the garnishment was served, or that he is still the holder at the time of answering, it does not follow that the maker may be charged as garnishee, for the defendant may pass the note at any time.[4] The maker becomes liable when the currency or negotiability of the note has been destroyed by notice or otherwise pursuant to peculiar statutory provisions, if the defendant is shown to be the holder.

When a note of a firm was delivered to the payee who put it in the hands of a member of the firm to secure the latter in case of loss because of his having become security to the payee on a bond, it was decided that the firm were not chargeable as garnishees in a suit against the payee, for the reason that the note was not in his possession.[5] The general rule however is that the maker is garnishable if summoned before payment if the control continues in the original payee.

Payment to the credit of the payee of a note under a gar-

[1] Hawes *v.* Waltham, 18 Pick. 451; Hoyt *v.* Robinson, 10 Gray, 371; Bulfinch *v.* Winchenbach, 3 Allen, 161.

[2] Sullivan *v.* Langley, 128 Mass. 235; West *v.* Platt, 116 Mass. 308; Terry *v.* Sisson, 125 Mass. 560; Wright *v.* Herrick, 125 Mass. 154.

[3] Parker *v.* Danforth, 16 Mass. 299; Warner *v.* Perkins, 8 Cush. 518; Atkins *v.* Prescott, 10 N. H. 120; Peck *v.* Barnum, 24 Vt. 75. (See Kidder *v.* Packard, 13 Mass. 80.)

[4] Sheets *v.* Culver, 14 La. 449; Kimball *v.* Plant, Id. 511; Stone *v.* Dean, 5 N. H. 502; McMillan *v.* Richards, 9 Cal. 365; Gregory *v.* Higgins, 10 Id. 339; Hinsdill *v.* Safford, 11 Vt. 309; Little *v.* Hale, Id. 482; Hutchins *v.* Evans, 13 Vt. 541; Hunt *v.* Ely, 17 Fla. 775.

[5] Hunt *v.* Ely, 17 Fla. 775.

nishment judgment is no defense against a second indorsee who was not a party to the proceeding.[1]

The maker of a negotiable note owes somebody but not necessarily the payee named therein. And in a suit against the payee, he cannot ordinarily be subjected to garnishment. How can he answer that he owes the payee, when the note may have passed into other hands? He usually does not know. His obligation is to pay the holder at maturity. Even if he does know and does answer that the note is still in the hands of the original payee, while it is not yet due, no judgment can be rendered against him as garnishee, for the reason that the holder may pass it off afterwards, and the obligation would be to the transferee; and therefore, should judgment be rendered against him upon his answer, he might be subjected to the injustice of having to pay twice.

Would payment of the note, under such judgment, be any protection to the garnishee, should the note be afterwards presented by the rightful owner? Could he plead payment in defense? As he certainly could not, such judgment would place him in a worse position than that which he previously occupied, which is against justice and against the first principle governing the process of garnishment.

If the note given by the garnishee to the defendant has been so disposed of by the latter that it is certainly not upon the market, the maker may be charged as garnishee. But he cannot be so charged when the note has passed from the hands of the defendant and is somewhere upon the market.[2]

When the legal title is vested in the indorsee, by endorsement after maturity, the amount due on the note, (a notiable promissory one,) cannot be garnisheed in the hands of the maker, in a suit against the original holder. It is not to be assumed that he is still the debtor of the original holder, whether he has notice of the transfer or not.[3]

If a negotiable note has been transferred after the attachment has been served on the defendant, but before maturity, the

[1] Holland *v.* Smith, 11 Mo. App. 6.
[2] Warne *v.* Kendall, 78 Ill. 598.
[3] Knisely *v.* Evans, 34 Ohio St. 158.

maker cannot be held as garnishee of the payee or endorser, when he has had no notice of the attachment.[1] The holder takes an overdue note subject to equities between the original parties including the right acquired by an attaching creditor by garnishing the maker.[2]

Whenever assignment and notice to the maker is necessary to the transfer of the note, the maker when summoned as garnishee may state with certainty that he owes the payee, in the absence of notice: therefore garnishment will be maintained. He could, in such case, if required to pay by judgment of court, defend against a subsequent demand of an assignee, and therefore would suffer no wrong by reason of the garnishment. Where, under statutory provision, an unnegotiable note may be assigned without notice given, the maker cannot rightfully be subjected to garnishment any more than where the paper is negotiable; for, the reason for his liability failing, there is no liability.

But if the maker of a negotiable note not matured is garnished by the payee's creditor, and afterwards takes up the note at maturity and gives the payee another negotiable note for the same debt, he is liable under the garnishment. It is true that such note may have passed into unknown hands before judgment, and may not be due;[3] but the drawer, under the circumstances, ought not to be heard to plead such a defense. For if a garnishee surrenders notes of the debtor after summons, he is liable to the creditor, if they are shown to be good and subject to garnishment.[4] He may pay an indorsee after being summoned as garnishee of the payee if his fees are not paid.[5]

The maturity of a note, or of any obligation, cannot be hastened by attachment; the creditor cannot make the garnishee pay any earlier than the defendant could, had no suit been

[1] Cruett *v.* Jenkins, 53 Md. 217.

[2] Burton *v.* Wynne, 55 Ga. 615. It was held in Nebraska that a negotiable note or bill, transferred fraudulently before maturity to protect the debt from the creditors of the payee, may be subjected to garnishment while remaining in the hands of such indorsee. Clough *v.* Buck, 6 Neb. 343.

[3] Leslie *v.* Merrill, 53 Ala. 322.

[4] Stevens *v.* Dillman, 86 Ill. 233.

[5] Kauffman *v.* Jacobs, 49 Iowa, 432.

brought against the latter. Indebtedness by the garnishee, existing and acknowledged, does not imply that immediate payment may be demanded. Garnishment may operate the securing of the payment into court when due but cannot change the contract between the payor and payee of a note by creating an earlier date of maturity than was stipulated.

A credit may be subjected to garnishment with all its subsequent growth by way of interest; an article of property may be so subjected with all its later accretion of additional value by a rise in the market; but no garnishment can take hold of anything not already in the garnishee's hands, excepting the enhancements of value above suggested.

There may be diminution of value without the fault of the garnishee, and he cannot be held responsible therefor. Why should he be made to account for a cask of liquor, evaporated to a mere liquor cask after summons?

The liability is measured by the indebtedness at the time of the garnishment,[1] when the interrogatories do not not cover subsequent time; and governed by the character of such indebtedness. If payable not in money but in negotiable promissory notes, such indebtedness would not make the defendant's debtor liable to garnishment at the suit of the attaching creditor, when the times of the maturity of such notes is not stated by the garnishee nor inquired into by the plaintiff.[2]

The liability of the garnishee cannot be greater than that of the defendant.[3]

Sec. 4. Assignment, with Reference to Garnishment.

Property validly assigned cannot be reached by garnishment, since it no longer belongs to the assignor, and therefore his creditor cannot make his money out of it. The assignee, if summoned as garnishee, may unequivocally answer that he has nothing of the defendant's in his possession. Should the creditor believe the assignment fraudulent, he may traverse the

[1] Huntington *v.* Risden, 43 Iowa, 517.

[2] Fuller *v.* O'Brien, 121 Mass. 423.

[3] Samuel *v.* Agnew, 80 Ill. 553; Waldron *v.* Wilcox, 13 R. I 518

answer and introduce evidence *aliunde* to show that the property still belongs to the debtor and is subject to garnishment in the hands of the alleged assignee.[1] In such case, upon whom is the burden of proof to show the validity of the assignment? It would seem that knowledge of it is more particularly in the mind of the garnishee; but, on the other hand, his answer must stand as true until shown to be false; he is, if honest, a disinterested third person who ought not to be made bear the burden of litigation between the creditor and the debtor; and if the creditor would hold him accountable, he should make out his own case. Certainly the creditor should make out a *prima facie* case of fraud and collusion between the debtor and the assignee before the latter can be obliged to establish the validity of the assignment. Where the question of validity turns upon the legality of the consideration, the *onus* would be upon the assignee summoned as garnishee, upon a comparatively slight showing of fraud by the creditor, since the assignee, being a party to the alleged contract of assignment must be presumed to know, better than a stranger to the contract, the exact character and amount of the consideration he professed to have paid and the particular terms of the transaction.[2]

He is not liable in garnishment, though he may have had no notice of the assignment up to the time of the summons. Subsequent notice, received before filing his answer, will enable him to set up the fact of transfer and escape judgment against him as garnishee. True, acceptance of the transfer on his part would be necessary to complete the assignment; but if the assignor already owed him a sum sufficient as valid consideration, he may accept so soon as he knows of the assignment on the part of his debtor; and there is no reason why another creditor of the same debtor should gain any advantage over him by serving him with the process of garnishment before he knows of such payment to himself.

Whatever amounts to the payment of a debt due the garn-

[1] Hecht *v.* Green, 61 Cal. 269.

[2] Maher *v.* Brown, 2 La. 492; Giddings *v.* Coleman, 12 N. H. 153.

ishee so as to cancel any obligation he may have been under to the defendant, will justify him in answering that he does not owe the latter, even though his knowledge of such cancellation should reach the garnishee after the summons; but, if the garnishee and the defendant are mutually indebted to each other and their accounts not liquidated, that fact should be sufficient for the discharge of the garnishment. If, before summons, the garnishee has accepted an order from the defendant to pay all the funds in his hands, belonging to the defendant, to another creditor who has accepted, the summons would come too late to avail the plaintiff.[1]

An assignment having been agreed upon between the debtor and the garnishee, based on valid consideration, but yet lacking in some of the legal forms of transfer, may be perfected after the service of the garnishment and successfully set up against the garnishment.[2]

Either defendant's property in the hands of a third person, or debt due him by such third person, may be equitably assigned so as to be beyond the reach of garnishment. Though the assignor may still be competent to manage the property or collect the debt in behalf of others, yet as he retains no interest, it cannot be subjected to garnishment as his property or credit.

An assignment, to pay a debt, of more property than is sufficient for the purpose, would not prevent a creditor of the assignor from attaching the excess in the hands of the assignee.[3] In all cases, notice of assignment should be given to the assignor's debtor, since he might otherwise answer an interrogatory, whether he is indebted to the defendant in an attachment suit, in the affirmative, and be held liable, notwithstand-

[1] Dobbins *v.* Hyde, 37 Mo. 114; Botsford *v.* Simmons, 32 Mich. 352; Legro *v.* Staples, 16 Me. 252; Colt *v.* Ives, 31 Ct. 25; Adams *v.* Robinson, 1 Pick. 461; Mansard *v.* Daley, 114 Mass. 408; Newell *v.* Blair, 7 Mich. 103; Dwight *v.* Bank of Michigan, 10 Met. (Mass.) 58; Bourne *v.* Cabot, 3 Id. 305; Ward *v.* Lewis, 4 Pick. 518; Cutts *v.* Perkins, 12 Mass. 206.

[2] U. S. *v.* Vaughan, 3 Binney, 394.

[3] Barker *v.* Osborne, 71 Me. 69; Abbott *v.* Stinchfield, 71 Me. 213.

ing a valid transfer so far as the defendant and the assignee or transferee are concerned.[1]

Whatever is exempt from execution is also exempt from garnishment.[2]

If the garnishee is himself a lien-holder, or if he is an ordinary creditor in possession, he may disclose such fact. The property or credit would not be subject to garnishment to the displacement of the pre-existing lien;[3] but, except so far as possession by a creditor of his debtor's property gives a common-law lien, the fact of the garnishee's being an ordinary creditor would not necessarily defeat the garnishment or place the attaching creditor lower in rank than such third person. The latter might intervene and set up his claim, or bring a separate attachment suit.[4]

If the defendant has authorized the payment of what is due to him to a third person, and the garnishee has agreed so to pay, and the assignee has assented, garnishment by the creditor of the defendant will not hold.[5] The assent of the assignee is essential to the perfection of the assignment, and therefore a mere direction to the garnishee to make the transfer without the beneficiary's knowledge or consent, would not be a complete

[1] Golson *v.* Powell, 32 La. Ann. 521.

[2] Flournay *v.* Lyon, 62 Ala. 213; Rowell *v.* Powell, 53 Vt. 302; George *v.* Bassett, 54 Id. 217; Fanning *v.* First Nat. Bank, 76 Ill. 53; Holbrook *v.* Baker, 5 Me. 309; Davenport *v.* Swan, 9 Humph. 186; Hall *v.* Page, 4 Ga. 428; Staniels *v.* Raymond, 4 Cush. 314; Andrews *v.* Ludlow, 5 Pick. 28; Christmas *v.* Biddle, 13 Pa. St. 223; Gery *v.* Ehrgood, 31 Id. 329; Lyle *v.* Barker, 5 Binney, 457; Plant *v.* Smythe, 45 Cal. 161; Wilson *v.* Bartholomew, 45 Mich. 41; Anderson *v.* Odell, 51 Id. 492.

[3] Mean *v.* New York, Housatonic & Northern R. R. Co. 45 Ct. 225; Kergin *v.* Dawson, 6 Ill. 86; Haven *v.* Low, 2 N. H. 13; Curtis *v.* Norris, 8 Pick. 280; Badlam *v.* Tucker, 1 Id. 389; Sibley *v.* Leffingwell, 8 Allen, 584; Grant *v.* Shaw, 16 Mass. 341; Picquet *v.* Swan, 4 Mason, 443; Mitchell *v.* Byrne, 6 Rich. (S. C.) 171; Central Bank *v.* Prentice, 18 Pick. 396; Callender *v.* Furbish, 46 Me. 226.

[4] Rodrigues *v.* Trevino, 54 Tex. 198; Adour *v.* Seeligson & Co. Id. 594; Allen *v.* Hall, 5 Met. (Mass.) 263; Lewis *v.* Harwood, 28 Minn. 428; Coone *v.* Braun, 23 Minn. 239; Allen *v.* Megguire, 15 Mass. 490; Peck *v.* Stratton, 118 Mass. 406; Bailey *v.* Ross, 20 N. H. 302; Romagosa *v.* Nodal, 12 La. Ann. 341.

[5] Botsford *v.* Simmons, 32 Mich. 352; Van Staphorst *v.* Pierce, 4 Mass. 258.

assignment, and garnishment would hold in a suit against the assignor.[1]

A debtor cannot assign money not earned but to become due under an appointment promised but not obtained, so as to protect it from garnishment when it shall become due.[2]

An assignment by an insolvent debtor to trustees for the payment of his creditors *pro rata*, will not render the trustees liable to garnishment at the suit of one of his creditors, while the trust remains unclosed, and the creditor not yet entitled to a dividend.[3] After such assignment, money due the assignor cannot be reached by any creditor through the process of garnishment.[4] Such assignment, however, must be a valid one, for the holder of funds invalidly assigned may be garnished in an attachment suit against the assignor.[5] And if the assignment is valid, the holder is exempt from garnishment in a suit against the assignor only to the amount assigned; any surplus remaining in his hands is liable to the process, as a matter of course, just as though there had been no act of assignment.[6]

The assignment of a judgment, upon agreement that the assignee shall retain what is due him and pay the balance to another creditor of the assignor, will not render the assignee garnishable, after the collection of the money upon the judg-

[1] Center *v.* McQuesten, 18 Kan. 476; People *v.* Johnson, 14 Ill. 342; Cushman *v.* Haynes, 20 Pick. 132; Woodbridge *v.* Perkins, 3 Day, 364; Baker *v.* Moody, 1 Ala. 315; Myatt *v.* Lockhart, 9 Ala. 91; Clark *v.* Cilley, 36 Ala. 652; Hearn *v.* Foster, 21 Tex. 401; Massachusetts Nat. Bank *v.* Bullock, 120 Mass. 86; Kelly *v.* Roberts, 40 N. Y. 432; McCoid *v.* Beatty, 12 Iowa, 299; Mayer *v.* Chattahoochie National Bank, 51 Ga. 325; Redd *v.* Burns, 58 Ga. 574; Briggs *v.* Block, 18 Mo. 281; Sproule *v.* McNulty, 7 Mo. 62; Botsford *v.* Simmons, 32 Mich. 352; Brown *v.* Foster, 4 Cush. 214; Mansard *v.* Daley, 114 Mass. 408; State *v.* Brownlee, 2 Speers, 519; Dolsen *v.* Brown, 13 La. Ann. 551; Connelly *v.* Harrison, 16 Id. 41; McGuire *v.* Pitts, 42 Iowa, 535.

[2] Egan *v.* Luby, 133 Mass. 543.

[3] Massachusetts National Bank *v.* Bullock, 120 Mass. 86; Mansfield *v.* Rutland Manf. Co. 52 Vt. 444. In this case, the trust required that the creditors be paid *pro rata*, but the trustees seem to have made some preferences among the creditors. Yet, in the attachment suit, it was doubtless correctly decided that they could not be made garnishees. Schlaeter *v.* Raymond, 7 Neb. 281.

[4] Dehner *v.* Helmbacher Forge, etc. Mills, 7 Ill. App. 47.

[5] Mansard *v.* Daley, 114 Mass. 408.

[6] Giles *v.* Ash, 123 Mass. 353. See First Nat. Bank *v.* Portland & O. Ry. Co. 2 Fed. Rep. 831.

ment, in an attachment suit against the assignor. The reason is that the assignor no longer has any interest in the judgment or its proceeds—part having been transferred to the assignee in payment, and the balance in trust for the payment of another creditor.[1]

One summoned as a garnishee indebted to the attachment defendant, who knows that the indebtedness has been transferred by assignment, yet makes answer acknowledging that he owes the defendant, and makes no disclosure of the assignment, not only becomes chargeable as garnishee,[2] but remains liable to the assignee.[3] The latter is no party to the attachment suit, and the garnishee cannot conclude him, or debar him of any of his legal rights by answering untruly that he owes the defendant. If, upon the return day to the writ of garnishment, (where the proceeding against the garnishee is a separate, though ancillary action,) the plaintiff should be defaulted for failure to appear,[4] the garnishee cannot waive the default and voluntarily submit to judgment, to the injury of the assignee.[5]

An order from a client to his attorney, in a pending case, to pay over whatever may be recovered to some named third person is not an assignment of the client's interest so as to defeat the garnishment of the credit in a suit against him, even though the attorney should consent to comply with the request.[6]

An assignment for the benefit of creditors, accepted by the assignee but not by all the creditors, will not preclude the garnishment of a debt due the assignor by a creditor who did not accept the assignment, unless it is proved that the sum held by the garnishee is necessary to pay the creditors who have elected to

[1] Hughes *v.* Sprague, 4 Ill. App. 301.

[2] Tabor *v.* Van Vranken, 39 Mich. 793.

[3] Id; Johnson *v.* Dexter, 38 Mich. 695.

[4] Wilcox *v.* Clement, 4 Den. 162; McCarty *v.* McPherson, 11 Johns. 406; Shufelt *v.* Cramer, 20 Johns. 309; Barber *v.* Parker, 11 Wend. 52; Brady *v.* Tabor, 29 Mich. 199; Redman *v.* White, 25 Mich. 526; Stadler *v.* Moors, 9 Mich. 264.

[5] Dobbins *v.* Hyde, 37 Mo. 114; Dickey *v.* Fox, 24 Mo. 217; Funkhouser *v.* How, 24 Mo. 49; Gates *v.* Kerby, 13 Mo. 157; Andrews *v.* Herring, 5 Mass. 212; Johnson *v.* Dexter, 38 Mich. 695.

[6] White *v.* Coleman, 130 Mass. 316.

come in under the assignment or trust deed.[1] If the amount of assets assigned is greater than the aggregate of the sum due those creditors who assent to the assignment, the surplus is liable to garnishment in the hands of the assignee, by other creditors.[2]

Property assigned for the benefit of creditors, to be converted into money by the trustees and distributed *pro rata* among the creditors, is not garnishable in the hands of the trustees, for the debt due one of the creditors, until after such conversion.[3]

It sometimes happens that the defendant has transferred his claim against his debtor without giving notice to the latter. In such case, the latter being interrogated in an attachment suit against the defendant may admit indebtedness and be lawfully held liable.[4] Under such circumstances, his payment of the amount of the debt into court under order would acquit him of all further liability to the defendant. The transferee of the latter might intervene to contest the right of the attaching creditor to reach this sum. If he should suffer loss, he must attribute it to the neglect of himself and the defendant in not giving due notice of the transfer, so as to enable the garnishee to answer that he is not indebted to the defendant.

Notice by creditors to the debtor of their debtor that they intend to issue process of garnishment against him is wholly without legal effect, and he may pay his debt without incurring any liability to the notifying creditors.[5]

The plaintiff may reach property in the hands of a garnishee fraudulently transferred to the latter by the defendant.[6] Here is a case where the defendant could not recover the property at law, yet his creditor may; for the fraudulent transfer debars the defendant from sueing for it, though it is no estoppel should the plaintiff in an attachment suit seek to reach the property in the transferree's hands by the process of garnishment. Suppose the fraudulent transfer is under the form of a sale: so far as

[1] Douglas *v.* Simpson & Trustee, 121 Mass 281.

[2] Everett *v.* Walcott, 15 Pick. 97,

[3] Mass. Nat. B'k. *v.* Bullock, 120 Mass. 86.

[4] Golson *v.* Powell, 32 La. Ann. 521.

[5] Fisher *v.* Hall, 44 Mich. 493.

[6] Gutterson *v.* Morse, 58 N. H. 529

the plaintiff in the attachment suit is concerned, the vendee may be treated as the mere custodian of the debtor's property; but so far as the fraudulent vendor is concerned, he would be estopped from recovering the property under allegation of his own wrong-doing. The plaintiff in an attachment suit against the defendant could treat such property as still belonging to the latter, though in the hands of a third person; yet the defendant could not claim it as his and have his right of action against such third person. Here then is a case where the plaintiff asserts indebtedness to the defendant by another, and virtually sues upon it, thus doing what the defendant himself could not do. The general rule, that the plaintiff can have no greater right against the garnishee than the defendant himself possesses, is thus subject to an exception.

Fraud estops the garnishee from successfully claiming the benefit of exemption. If he has wrongfully obtained possession of the defendant's property under a chattel mortgage, and has withheld the mortgage from record in fraud of defendant's creditors, he cannot be heard to set up his mortgage lien to defeat the garnishment.[1] When a stranger to proceedings by attachment is about to be wronged by reason of a previous fraudulent action of the defendant, he may be allowed to intervene and show that what the garnishee holds as the money of the defendant really belongs to himself, though the defendant would be estopped from setting up his own wrong-doing.[2] As a general rule, however, the attaching creditor can only reach, in the hands of the garnishee, what the defendant might have recovered had there been no garnishment.[3]

[1] Cummings *v.* Fearey, 44 Mich. 39, upon a statute requiring that chattel mortgages be recorded. United States *v.* Vaughan, 3 Binney, 394; Lamb *v.* Stone, 11 Pick. 527.

[2] Turner *v.* Burnell, 48 Wis. 221, in which the defendant, an agent of the intervenor, had caused himself to be credited in an estate account instead of his principal. When the administrators of the estate were garnished as the debtors of the agent, the principal was allowed to intervene, prove the facts and defeat the garnishment.

[3] U. States *v.* Robertson, 5 Pet. 641; Wilcox *v.* Mills, 4 Mass. 218; Harris *v.* Phœnix Ins. Co. 35 Ct. 310; Brown *v.* Silsby, 10 N. H. 521; St. Louis *v.* Regenfuss, 28 Wis. 144; Myer *v.* Liverpool, etc., Ins. Co. 40 Md. 595. Burton *v.* District Township, 11 Iowa, 166; Tupper *v.* Cassell, 45 Miss. 352;

One is not liable to garnishment if he has paid what he owed the defendant in attachment by a bank check, though the latter may not have presented the check to the bank and drawn the money prior to the service of the process of garnishment upon the drawer of the check.[1] It is true that the funds in the bank are still under his control so that he might stop payment of the check; and, so far as the bank is concerned, he has the right to control the deposit; but he has no moral right to do so, considering his relation to the payee who has taken the check in payment or earnest of payment. At all events, the drawer, as garnishee, is not under the slightest obligation to countermand his own check for the purpose of enabling a professed creditor of the payee to attach the credit in his hands and suspend settlement of his account with the payee for an indefinite time.

If a depositor puts money in bank to the credit of another to whom a certificate of deposit is issued by the bank, the fund can be reached by the garnishment of the bank in a suit against the holder of the certificate but not in a suit against the depositor.[2]

An obligation of a garnishee payable in negotiable promissory notes at the time of summoning the garnishee, is not garnishable in an attachment proceeding against the obligee, when it does not appear that there is any debt absolutely due him.[3] But a promissory note may be garnisheed after maturity if owned by the defendant, and it may safely be paid into court after judgment against the defendant.[4]

There are circumstances under which the garnishee will be held liable, though the defendant could not immediately recover of him: under some statutes, when the debt is not yet due;[5] when the obligation of the garnishee is to two persons jointly, but one of whom is the defendant in the attach-

Peet *v.* Whitmore, 16 La. Ann. 48; Coble *v.* Nonemaker, 78 Pa. St. 501; Woodhouse *v.* Commonwealth Ins. Co. 54 Id. 307.

[1] Getchell *v.* Chase, 124 Mass. 366.

[2] Exchange Bank *v.* Gulick, 24 Kan. 359.

[3] Fuller *v.* O'Brien, 121 Mass. 422.

[4] Somers *v.* Losey, 48 Mich. 294, with reference to § 6445 Mich. Compiled Laws; Howell's Stat. § 8037.

[5] Nicholls *v.* Scofield, 2 R. I. 123; Clapp *v.* Hancock, 1 Allen, 394.

ment suit;[1] when notice, on the part of the defendant, is a prerequisite to recovery.[2]

Where the defendant has property or funds in the hands of a sheriff, constable, administrator, executor, attorney, agent, bailee or trustee, under such circumstances that he cannot institute suit for it without previous notice or demand, such property or funds, if otherwise liable to be subjected to garnishment, cannot be exempt for want of such preliminary action on the part of the defendant; for, if so, he might foil the thrust of the creditor by purposely avoiding the giving of notice or the making of the demand. The general rule is that the creditor has no greater rights against the garnishee than the defendant had before the summons; that he steps into the shoes of the defendant and prosecutes for him that the credit or property of the latter may be subjected to the payment of such judgment as may be obtained against him; but here is a reasonable exception to the rule, so manifestly just that the opposite course is clearly seen to defeat the purposes of justice.

Whether, as under the custom of London, the plaintiff may "surmise" that his debtor has property in the hands of another, or funds in such hands, liable to garnishment, and may thereupon garnish himself, is not everywhere settled in this country. It has been held that the plaintiff cannot garnish himself.[3]

Sec. 5. Legal Custodians.

Money and property in an officer's hands under such circumstances as to be in the custody of the law, is not subject to garnishment or attachment.[4]

[1] Miller *v.* Richardson, 1 Mo. 310; Whitney *v.* Munroe, 19 Me. 42.

[2] Staples *v.* Staples, 4 Me. 532; Woodbridge *v.* Morse, 5 N. H. 519; Quigg *v.* Kittredge, 18 N. H. 137; Corey *v.* Powers, 18 Vt. 588; Thayer *v.* Sherman, 12 Mass. 441; Mann *v.* Buford, 3 Ala. 312; Riley *v.* Hirst, 2 Pa. St. 346.

[3] Knight *v.* Clyde, 13 R. I. 518; Blaisdell *v.* Ladd, 14 N. H. 129; Hoag *v.* Hoag, 55 Id. 172; Belknap *v.* Gibbens, 13 Met. (Mass.) 471. *Contra:* Coble *v.* Nonemaker, 78 Pa. St 501; Lyman *v.* Wood, 42 Vt. 113; Grayson *v.* Veeche, 12 Martin, (La.) 688: Richardson *v.* Gurney, 9 La. 285. See Boyd *v.* Bayless, 4 Humph. 386; Arlege *v.* White, 1 Head, 241.

[4] Wendell *v.* Pierce, 13 N. H. 502; Dawson *v.* Holcomb, 1 Ohio, 275; Dean *v.* McGavock, 7 Humph. 132;

No one would contend that property in the possession of a sheriff, seized in execution, to satisfy a judgment, could be made the subject of garnishment in an attachment suit brought by a creditor of the judgment-creditor who had sued out the execution. Such property, thus seized by the sheriff, does not belong to the judgment-creditor and cannot be attached by any other as his. Now, after the sale of such property under the writ, do the proceeds belong to the judgment-creditor in such a sense as to be attachable as his by another suitor in a new suit? They do not yet belong to him. The sheriff has his time for returning the writ. Good reasons exist for the legal delay, such as the possibility of mistakes to be corrected, the awarding of the costs by the court, etc. If, when the time has arrived for paying over the proceeds to the plaintiff in satisfaction of the judgment, the sheriff should fail to do so, the law gives the plaintiff his proper remedy. But, before the money has been paid to the plaintiff, it is not his. It is in process of payment,

Clymer *v.* Willis, 3 Cal. 363; Curling *v.* Hyde, 10 Miss. 374; Alston *v.* Clay, 2 Haywood, 171; Millison *v.* Fisk, 43 Ill. 112, 118; Roberts *v.* Dunn, 71 Ill. 46; Lightner *v.* Steinagel, 33 Ill. 513; Pierce *v.* Carleton, 12 Ill. 364, (but a sheriff may be garnished for a surplus in his hands received on execution, *Ib.*) Ross *v.* Clarke, 1 Dall. (Pa.) 354; Hunt *v.* Stevens, 3 Iredell, 365; Reddick *v.* Smith, 3 Scam. 451; Lathrop *v.* Blake, 3 Foster, 46; Staunton *v.* Holmes, 4 Day, (Ct.) 87, 96; Odiorne *v.* Colley, 2 N. H. 66; Winchell *v.* Allen, 1 Ct. 385; Beers *v.* Place, 36 Ct. 578; The Oliver Jordan, 2 Curt. 414; Watson *v.* Todd, 5 Mass. 271; Brooks *v.* Cook *et al.* 8 Mass. 246; Vinton *v.* Bradford, 13 Id. 114; Thompson *v.* Marsh *et al.* 14 Mass. 269; Burlingame *v.* Bell, 16 Mass. 318; Robinson *v.* Ensign, 6 Gray, 300; Barnes *v.* Treat *et al.* 7 Mass. 271; Thompson *v.* Brown, 17 Pick. 462; Ladd *v.* Gale, 57 N. H. 210; Curling *v.* Hyde, 10 Miss. 374; Blair *v.* Canty, 2 Speers, (S. C.) 34; Turner *v.* Fendall, 1 Cranch, 117; Jones *v.* Jones, 1 Bland, (Md.) 443; Burroughs *v.* Wright, 16 Vt. 619; Prentiss *v.* Bliss, 4 Vt. 513; Conant *v.* Bicknell, 1 D. Chipman, (Vt.) 59; First *v.* Miller, 4 Bibb. 311; Moore *v.* Whittenburg, 13 La. Ann. 22; Dubois *v.* Dubois, 6 Cowen, 494; Taylor *v.* Carryl, 24 Pa. St. 259; Crane *v.* Freese, 1 Har. (N. J.) 305; Moore *v.* Graves, 3 N. H. 408; Farmers' Bank *v.* Beaston, 7 Gill & J. (Md.) 421; The Robert Fulton, 1 Paine, 620; Benson *v.* Berry, 55 Barb. 620; Freeman *v.* Howe, 24 How. 450; Harbison *v.* McCartney, 1 Grand, Pa. 172; Lewis *v.* Buck, 7 Minn. 104; Walker *v.* Foxcroft, 2 Me. 270; Strout *v.* Bradbury, 5 Id. 313; Oldham *v.* Scrivener, 3 B. Mon. 579; Stillman *v.* Isham, 11 Ct. 124; Thayer *v.* Tyler, 5 Allen, 94; Pace *v.* Smith, 57 Tex. 555. But a constable may be garnished for funds collected by execution under Wis. Stat. § 2769: Storm *v.* Adams, 56 Wis. 137.

going from the defendant to the plaintiff, not attachable now as the defendant's money, but would certainly be returnable to the defendant should the judgment be annulled for any reason.

While in the custody of the sheriff, the money cannot be deemed a credit belonging to the plaintiff. The relation of debtor and creditor does not exist between them. Were the money, made by execution, liable to garnishment sued out by a creditor of the judgment-plaintiff of the original suit, either as the money or credit of such plaintiff in the hands of the sheriff as a third person, where would litigation end? The person attaching the money could not enter the original judgment satisfied, because he would not be a party to the record of the case. Besides, the sheriff is not the agent of the plaintiff who sued out the writ of execution by which the money comes into the officer's hands. However, when litigation has ended, the money ready to be paid to the plaintiff may be attached in the sheriff's hands, under certain circumstances, as hereafter shown.

Money made by a sheriff, on execution, is in his hands as a legal and official custodian, not as the agent or trustee of the judgment-creditor. The money is not deposited in the sheriff's hands by the plaintiff; the particular coins or notes collected by the sheriff constitute no part of the property of the plaintiff: why then should a creditor of the latter be allowed to reach such money by garnishment, while it is in the officer's hands? The sheriff has collected it under *fi. fa.* issued at the instigation of the plaintiff, it is true; but, after the execution of the writ, he does not *owe* the plaintiff, and is not obliged to pay the collected money directly to him, (though he may legally do so,) for payment into the registry of the court would satisfy the law, so far as his official duty is concerned. He is not anywhere obliged to pay to the plaintiff before demand and before the return day of the writ, though he has received the money earlier.[1]

[1] Wilder *v.* Bailey & Trustee, 3 Mass. 289, 293; Farr *v.* Newman, 4 Term R. 651; Hill *v.* La Crosse & M. R. Ry. Co. 14 Wis. 291; Marvin *v.* Hawley, 9 Mo. 382; Overton *v.* Hill, 1 Murph. 47; Clymer *v.* Willis, 3 Cal. 363; Dawson *v.* Holcombe, 1 Ohio, 135; First *v.* Miller, 4 Bibb. 311;

A surplus, remaining in the sheriff's hands after an execution has resulted in the payment of the plaintiff and the satisfaction of the judgment, clearly belongs to the defendant. The sheriff has no right to withhold it from that owner. It cannot be retained on the pretense that it is *in custodia legis*. The sheriff does not hold it in his official capacity. There is no reason why the person holding such money belonging to the defendant may not be garnished in a suit against the defendant. Such person could not shield himself under his garb of shrievalty. He is none the less a proper garnishee by being a sheriff.[1] If, at any stage, the money in the sheriff's hands belongs to, and is recoverable by the defendant, it ought to be reachable by garnishment.[2] And the rule is the same when the money is held by a sheriff's deputy under such circumstances.[3]

It will be observed that it is not only the money and property of public corporations, such as states, counties, townships, school districts and cities, that is exempt from attachment and garnishment in the hands of their officers, but that money and property not belonging to such corporations are exempt when held by officers in such sense as to be deemed within the custody of the law.

What has been said of sheriffs will apply as well to clerks of courts, prothonotaries, recorders, registrars, justices of the

Chealy *v.* Brewer, 7 Mass. 259; Barnes *v.* Treat, Id. 271; Brooks *v.* Cook, 8 Id. 246; Pollard *v.* Ross, 5 Id. 319; Penniman *v* Ruggles, 6 Id. 166; Sharp *v.* Clark, 2 Id. 91; Reddick *v.* Smith, 4 Ill. 451; Turner *v.* Fendall, 1 Cranch, 117; Prentiss *v.* Bliss, 4 Vt. 513; Dubois *v.* Dubois, 6 Cow. 494; Blair *v.* Canty, 2 Speers, 34; Burrell *v.* Letson, Id. 378; Drane *v.* McGavock, 7 Humph. 132; Pawley *v.* Gaines, 1 Tenn. 208; Staples *v.* Staples, 4 Me. 532.

[1] Pierce *v.* Carlton, 12 Ill. 364; Wheeler *v.* Smith, 11 Barb. 345; Hearn *v.* Crutcher, 4 Yerg. 461; Jaquett *v.* Palmer, 2 Harrington, (Del.) 144; King *v.* Moore, 6 Ala. 160; Hill *v.* Beach, 1 Beas. 31; Adams *v.* Lane, 38 Vt. 640.

[2] Hoffman *v.* Wetherell, 42 Iowa, 89; Reifsnyder *v.* Lee, 44 Iowa, 101; Hurlburt *v.* Hicks, 17 Vt. 193; Conant *v.* Bicknell, 1 D. Chipman, 50; Lovejoy *v.* Lee, 35 Vt. 430; Woodbridge *v.* Morse, 5 N. H. 519; Crane *v.* Freese, 1 Harrison, 305; Burleson *v.* Milan, 56 Miss. 399.

[3] Watson *v.* Todd *et al.* 5 Mass. 271, 274. An auctioneer, selling for the sheriff, is his agent: Griffin *v.* Helmbold, 72 N. Y. 437.

peace, constables, receivers, disbursing officers, assignees in bankruptcy, trustees of insolvency, city and county treasurers, comptrollers, auditors, commissioners, etc., etc.[1]

What was said of the liability of sheriffs to garnishment for surplus funds in their hands, is equally applicable to the officers and official agents subsequently named. It will be understood that when any of them holds funds which are not within the custody of the law, he may be garnished.[2]

It will be readily perceived that the reason for holding a public officer exempt from liability to garnishment is totally inapplicable to an attorney at law, holding funds belonging to his client; and, indeed, inapplicable to any mere agent holding for a principal who may be readily sued by attachment. Where

[1] Voorhees *v.* Sessions, 34 Mich. 99; Cockey *v.* Leister, 12 Md. 124; Glenn *v.* Gill, 2 Md. 1; Williams *v.* Jones, 38 Md. 555; McPherson *v.* Snowden, 19 Md. 197; Groome *v.* Lewis, 23 Md. 137; Haydon *v.* Bank of Wisconsin, 1 Pinney, 61; Field *v.* Jones, 11 Ga. 413; Daley *v.* Cunningham, 3 La. Ann. 55; Hanna *v.* Bry, 5 La. Ann. 651; Nelson *v.* Connor, 6 Rob. (La.) 339; Gaither *v.* Bellew, 4 Jones. 488; Alston *v.* Clay, 2 Hayw. 171; Murrell *v.* Johnson, 3 Hill, (S. C.) 12; Merrill *v.* Campbell, 49 Wis. 535; Hunt *v.* Stevens, 3 Iredell, 365; Buchanan *v.* Alexander, 4 How. 20; Ross *v.* Clarke, 1 Dall. 354; Averill *v.* Tucker, 2 Cr. C. C. 544; Cole *v.* Wooster, 2 Ct. 203; New Haven Saw Mill Co. *v.* Fowler, 28 Id. 103; Corbyn *v.* Bollman, 4 Watts & Serg. 342; Burnham *v.* Fond du Lac, 15 Wis. 193; Van Riswick *v.* Lamon, 2 McArthur, 172; Bulkley *v.* Eckert, 3 Pa. St. 368; Lodor *v.* Baker, 39 N. J. L. 49; Dewing *v.* Wentworth, 11 Cush. 499; Bivens *v.* Harper, 59 Ill. 21; (See Jones *v.* Gorham, 2 Mass. 375;) Oliver *v.* Smith, 5 Mass. 183; Triebel *v.* Colburn, 64 Ill. 376; Casey *v.* Davis, 100 Mass. 124; Barnard *v.* Graves, 16 Pick. 41; Millison *v.* Fisk, 43 Ill. 112; Neuler *v.* O'Fallon, 18 Mo. 277; Wallace *v.* Lawyer, 54 Ind. 501; Mechanics & Trader's Bank *v.* Hodge, 3 Rob. (La.) 373; McKenzie *v.* Noble, 13 Rich. 147; Bentley *v.* Shrieve, 4 Md. Ch. 412; Hagedon *v.* Bank of Wisconsin, 1 Pinney, 61; Huntley *v.* Stone, 4 Wis. 91; Taylor *v.* Gillian, 23 Tex. 508; Dunlop *v.* Paterson Fire Ins. Co. 74 N. Y. 145; Bowden *v.* Schatzell, Bailey Eq. 360; Colby *v.* Coates, 6 Cush. 558. (See Decoster *v.* Livermore, 4 Mass. 101;) Clark *v.* Boggs, 6 Ala. 809; Langdon *v.* Lockett, Id. 727; Webb *v.* McCauley, 4 Bush, 8; Briggs *v.* Block, 18 Mo. 281; Bivens *et al. v.* School Directors, 59 Ill. 21.

[2] Hoffman *v.* Wetherell, 42 Iowa, 89; Wendell *v.* Pierce, 13 N. H. 502; Gaither *v.* Bellew, 4 Jones, 488; Clark *v.* Boggs, 6 Ala. 809; Langdon *v.* Lockett, Id. 727; Weaver *v.* Davis, 47 Ill. 235; Cole *v.* Wooster, 2 Ct. 203; Williams *v.* Jones, 38 Md. 555; Robertson *v.* Beall, 10 Id. 125; Van Riswick *v.* Lamon, 2 MacArthur, 172; Dunlop *v.* Paterson Fire Ins. Co. 74 N. Y. 145.

the principal, in such case, may have an attachment suit brought against him, his attorney, whether at law or in fact, may be garnished.[1]

An Illinois bank having obtained judgment against a citizen of New York, was sued there by an alleged creditor, who sought to subject the judgment-right to garnishment by serving the attorney of the judgment defendant. The latter had died before this service; and the court held that the service should have been on the legal representatives of the decedent's estate and not on the attorney of the defendant in the suit first mentioned.[2]

Money, credits and property are in the custody of the law when held by executors, administrators, guardians and like *quasi* officers, in their representative and administrative capacity. They are accountable to courts for what they administer, and there is ordinarily the same reason that the law's custody of things and credits should not be disturbed in their hands, as there is for non-disturbance in the hands of a sheriff or other officer.[3]

[1] Lucas *v.* Campbell, 88 Ill. 447; Thayer *v.* Sherman, 12 Mass. 441; Kelly *v.* McMinniman, 58 N. H. 288; Coburn *v.* Ansart, 3 Mass. 319; Hoffman *v.* Wetherell, 46 Iowa, 89; Staples *v.* Staples, 4 Me. 532; Riley *v.* Hirst, 2 Pa. St. 346; Kennedy *v.* Aldridge, 5 B. Mon. 141; Weaver *v.* Davis, 47 Ill. 235; Woodbridge *v.* Morse, 5 N. H. 519; Tucker *v.* Butts, 6 Ga. 580; Mann *v.* Buford, 3 Ala. 312; Re Flandrow, 20 Hun. 36.

[2] Re Flandrow, 20 Hun. 36.

[3] Roth *v.* Hotard, 32 La. Ann. 280; Deblieux *v.* Dotard, 31 Id. 194; Vierbeller *v.* Brutto, 6 Ill. App. 95; Brooks *v.* Cook, 8 Mass. 246; Barnes *v.* Treat *et al.* 7 Mass. 271; Davis *v.* Davis, 2 Cush. 111; Gassett *v.* Grout, 4 Met. (Mass.) 486; Waite *v.* Osborne, 11 Me. 185; Commercial Bank *v.* Neally, 39 Me. 402; Hansen *v.* Butler, 48 Me. 81; Sime's Estate, Messick's Probate, (Cal.) 100; Winchell *v.* Allen, 1 Ct. 385; Force *v.* Brown, 32 N. J. Eq. 118; Conway *v.* Armington, 11 R. I. 116; Perry *v.* Thornton, 7 R. I. 15; Davis *v.* Drew, 6 N. H. 399; Beckwith *v.* Baxter, 3 N. H. 67; Bank of Chester *v.* Ralston, 7 Pa. St. 482; Hess *v.* Shorb, Id. 231; Parker *v.* Donnally, 4 W. Va. 648; Welch *v.* Gurley, 2 Hayw. 334; Thorn *v.* Woodruff, 5 Ark. 55; Fowler *v.* McClelland, Id. 188; Shewell *v.* Keen, 2 Wharton, 332; Barnett *v.* Weaver, Id. 418; Post *v.* Love, 19 Fla. 634; Marvel *v.* Houston, 2 Harrington, 349; Tillinghast *v.* Johnson, 5 Ala. 514; Mock *v.* King, 15 Ala. 66; Picquett *v.* Swan, 4 Mason, 443; Gee *v.* Warwick, 2 Hayw. 354; Young *v.* Young, 2 Hill, (S. C.) 425; Godbold *v.* Bass, 12 Rich. 202; McCreary *v.* Topper, 10 Pa. St. 419.

So soon as the funds held by an executor, etc., cease to be in the custody of the law and become recoverable as belonging to some person, legatee, heir, etc., the rule ceases to be applicable. So also if he is garnishable by statute. There is sometimes a nice question as to the time when an administrator's relation to a fund or to property is so changed as to render him amenable to garnishment, but it is certain that he is liable when his custody ceases to be "the custody of the law" in its technical signification.[1]

An executor's right, conferred by the will of the testator, to sell the property of the estate, cannot be defeated by an attachment suit against one of the heirs and devisees, in which the latter's interest is attached and the executor made garnishee.[2] It can have no effect on the executor's right to sell and convey the property.[3] The purchaser at such sale would obtain a good title, notwithstanding the garnishment of the executor with reference to such interest.[4] Not till the final order of distribution, can an executor or administrator be garnished for the interest due a particular heir or devisee.[5]

If the attaching creditor is the administrator of an estate, he cannot garnish himself so as to reach the funds in his own hands and render them available to subserve his own interest as attaching creditor.[6]

The reason why an administrator or executor cannot be garn

[1] Hoyt *v.* Christie, 51 Vt. 48; Burleson *v.* Milan, 56 Miss. 399; Fitchett *v.* Dolbee, 3 Harrington, (Del.) 267; Stratton *v.* Ham, 8 Ind. 84; Piper *v.* Piper, 2 N. H. 439; Cady *v.* Comey, 10 Met. (Mass.) 459; Hoar *v.* Marshall, 2 Gray, 251; Wheeler *v.* Bowen, 20 Pick. 563; Holbrook *v.* Waters, 19 Id. 354; Woodward *v.* Woodward, 4 Halst. 115; Terry *v.* Lindsey, 3 Stew. & Port. 317; Holman *v.* Fisher, 49 Miss. 472; Cummings *v.* Garvin, 65 Me. 301; Adams *v.* Barrett, 2 N. H. 374; Richards *v.* Griggs, 16 Mo. 416; Curling *v.* Hyde, 10 Mo. 374; Raefle *v.* Moore, 58 Ga. 94; Parks *v.* Cushman, 9 Vt. 320; Hartle *v.* Long, 5 Pa. St. 491; Threshing Machine Co. *v.* Miracle, 54 Wis. 295; Hicks *v.* Chapman, 10 Allen, 463; Bartell *v.* Bauman, 12 Ill. App. 450.

[2] Smyth *v.* Anderson, 31 Ohio St. 144; Nickerson *v.* Chase, 122 Mass. 296; Force *v.* Brown, 32 N. J. Eq. 118.

[3] Allison *v.* Wilson's Executors, 13 Serg. & Rawle, 330.

[4] Smyth *v.* Anderson, 31 Ohio St. 144.

[5] Threshing Machine Co. *v.* Miracle, 54 Wis. 295.

[6] Hoag *v.* Hoag, 55 N. H. 172.

ished in a suit against the estate he administers is that he is not the attorney, agent, factor, trustee or debtor of such estate.[1]

No judgment for a specific sum can be rendered against an executor who answers as garnishee, in a suit against an heir, that there will be a portion due the defendant after the settlement of the succession.[2] What sum will then be due is a matter of contingency. Debts, legacies and costs must first be paid, and there is not such certainty of fact that the executor holds property or money belonging to the defendant as would justify holding the executor liable as garnishee under his answer setting forth such a state of things. The executor is not the creditor of the heir, and it not certain that he is the custodian of any property of his.

When the succession has been settled, and the sum due or the property belonging to the heir has become certain, the attaching plaintiff might successfully renew the garnishment, but the executor is not liable while it remains uncertain whether there will be anything to pay over to the defendant in the attachment suit. Should he, feeling confident that there will be something beyond the debts of the succession, retain in his hands enough to meet the demands of the attaching creditor, and pay over the balance to the heirs or legatees or their attorney, taking a receipt showing that the sum withheld is for the purpose stated, such sum cannot be considered an appropriation to the attaching creditor.[3] The creditor could not claim that he thus has acquired a legal right to it.

After an estate has been settled, and suit has been brought by attachment against one whose share therein has been ascertained, and garnishment of the executor in his personal capacity has been made, the garnishee will be held chargeable.[4] The administrator will not be allowed to hold the fund in his hands in his official capacity, under such circumstances, to shield the heir from the payment of a just debt, and to hinder the attaching creditor from making his money. The case is

[1] Conway *v.* Armington, 11 R. I. 116.

[2] Roth *v.* Hotard, 32 La. Ann. 280.

[3] Raefle *v.* Moore, 58 Ga. 94.

[4] Hoyt *v.* Christie, 51 Vt. 48.

very different from that where the estate remains unsettled, debts due by the succession unpaid, and legacies not distributed. In the latter case, the executor cannot be compelled, to pay by process of garnishment sued out even by the judgment creditor of an heir whose portion still remains unseparated from the mass of the estate.[1] Until there has been a settlement of the estate, at least so far as the judgment of distribution, the executor or administrator cannot be reached by garnishment.[2] It is not till the executor is ready to pay over to the heir that he is liable to garnishment in an attachment suit against the heir. When ready to pay, he is in a situation similar to that of a sheriff or constable who has collected money by virtue of an execution which he is ordered to pay to the plaintiff in execution. At that stage, he may be garnished by an attaching creditor whose suit is against the person to whom such collected funds are due.[3]

Since the executor or administrator is the proper collector of debts due the estate of the decedent, as well as the proper custodian of the funds when collected, they cannot be reached by a creditor of the estate through the process of garnishing the debtor.[4]

Garnishment proceedings cannot be revived against the administrator of a garnishee who has died without answering or being defaulted.[5]

Guardians are not liable as garnishees for the funds or property of their wards.[6]

Sec. 6. Non-resident Third Possessors.

Where one not a resident of the State in which the attachment suit is brought, may be summoned as a garnishee if with-

[1] Deblieux *v.* Dotard, 31 La. Ann. 194. In New Jersey, held that money in the hands of an executor, due to a legatee, constituted an active trust exempt by statute, so that it could not be reached to satisfy a judgment rendered in favor of a creditor of the legatee. Force *v.* Brown, 32 N. J. Eq. 118.

[2] Sime's Estate, Messick's Probate, (Cal.) 100.

[3] Burleson *v.* Milan, 56 Miss. 399.

[4] Marvel *v.* Houston, 2 Harr. (Del.) 349.

[5] White *v.* Ledyard, 48 Mich. 264.

[6] Vierbeller *v.* Brutto, 6 Ill. App. 95.

in the State so as to be subject to the process, he must true answer make as to the property of the defendant which he holds within the State, or property held elsewhere which he has obligated himself to deliver to the defendant within the State, and as to debt due defendant payable within the State. He cannot be required to answer touching money or goods over which the court has no jurisdiction. This is true, though he be a resident of the State; for the court may have jurisdiction over him yet not over property situated at a place to which the jurisdiction does not extend.

Both the defendant and the garnishee may be non-residents, yet if the latter be found within the jurisdiction and served with process of garnishment, the proceeding may hold good if he has assets of the defendant within the State.[1]

The non-resident garnishee, when found within the State and served with process, becomes personally amenable to the jurisdiction of the court issuing the process, and must answer. If he has nothing of defendant's within the State, and owes him nothing payable within the State, he must so swear, or he may be held contumacious and in fault, and be condemned to pay such judgment as may be rendered if the interrogatories amply cover the whole claim. None but himself is competent to present the state of facts by which he should be exonerated.

A firm located and doing business in a State, and having goods or credits of the defendant there, may be subjected to garnishment there through a resident member or members, although another member, or even a majority of those of the firm, may reside out of the State, and not be found temporarily in the State, and not summoned at all. A corporation located beyond the State bounds, having assets of the defendant within

[1] Sawyer *v.* Thompson, 4 Foster, 510. (See Cronin *v.* Foster, 13 R. I. 196.) Young *v.* Ross, 11 Foster, 201; Tingley *v.* Bateman, 10 Mass. 343; Ray *v.* Underwood, 3 Pick. 302; Hart *v.* Anthony, 15 Pick. 445; Nye *v.* Liscomb, 21 Pick. 263; Lovejoy *v.* Albree, 33 Me. 414; Baxter *v.* Vincent, 6 Vt. 614; Jones *v.* Winchester, 6 N. H. 497; Lawrence *v.* Smith, 45 N. H. 533; Green *v.* Farmers' & Citizens' Bank, 25 Ct. 452; Miller *v.* Hooe, 2 Cr. C. C. 622; Bates *v.* N. O. etc. R. R. Co. 4 Abbott's Pract. R. 72, Willet *v.* Eq. Ins. Co. 10 Abbott Pract. R. 193. (See Waldron *v.* Wilcox, 13 R. I. 518.)

the State, and an agent within it *on whom process may be legally served as on the corporation*, may be made a garnishee.

Whether a natural or an artificial person, whether a member of a firm or not, whether residing without the jurisdiction or not, whether having property or funds in the hands of the defendant or not, let the garnishee answer plainly, stating all the circumstances.

One who is only temporarily in a State in which he does not reside, cannot be subjected to garnishment, as a general rule. This rule, wherever it obtains, will warrant his discharge; and whenever he is exempt by law, he cannot waive the exemption, because it is not with him a personal matter, and he has no right to prejudice the defendant.[1] It would be different with one who has a regular place of business in a State though his principal residence were elswhere. A corporation frequently does business at the same time in several different States, and it is liable to garnishment in any one of them where it has an officer upon whom the process may be legally served, if it has property of the defendant there.[2] If a corporation is chartered in different States, it has corporate existence in each, as a matter of course, and may be treated in each as a resident.[3] But if not thus chartered so as to be, in contemplation of law, a resident of the State, it comes under the rule governing natural persons. It has been held that non-resident common carriers are not liable to foreign attachment for the loss of a trunk within the State.[4]

Non-residents are not usually liable to be garnished,[5] nor are foreign corporations; but should such a corporation operate in a State other than its own, (by permission or comity,[6]) it may become liable there to garnishment process.[7] One who holds property under trust created by judicial decree of a court in

[1] Rindge *v.* Green, 52 Vt. 204.

[2] Commerce Bank *v.* Huntington, 139 Mass. 444.

[3] Smith *v.* B. C. & M. Ry. Co. 33 N. H. 337; Balt. & Ohio R. Co. *v.* Gallahue, 12 Gratt. 655.

[4] Porter *v.* Hildebrand, 14 Pa. St. 129.

[5] Squair *v.* Shea, 26 Ohio St. 645.

[6] Liverpool Ins. Co. *v.* Massachusetts, 10 Wall. 566; The State *v.* Boston etc. R. R. Co. 25 Vt. 433.

[7] Railroad *v.* Peoples, 31 Ohio St. 537.

another State, which has jurisdiction of the matter, is accountable to the courts of that State only for the execution of the trust, and the property so held cannot be reached, by a beneficiary or his creditors, in a different State where the trustee resides.[1]

[1] Jenkins *v.* Lester, 131 Mass. 355; Curtis *v.* Smith, 60 Barb. 9.

CHAPTER VII.

CORPORATIONS AS GARNISHEES.

§ 1. States.
2. Counties, &c.
§ 3. Cities.
4. Private Corporations.

Sec. 1. States.

A State cannot be sued by process of garnishment, without its own consent, for the same reason that it cannot be sued by ordinary process; nor can it be indirectly garnished by making one of its officers the nominal garnishee. Funds in the hands of a State Treasurer, Auditor, Comptroller, Agent or disbursing officer, belonging to the State, cannot be reached by this process directed against any such officer. And the rule embraces the United States and the District of Columbia, and their officers and agents.[1]

Though public funds may have been appropriated, and placed in the hands of an officer to be paid to those who are creditors

[1] Dewey *v.* Garvey, 130 Mass. 86; Rodman *v.* Musselman, 12 Bush. 354; Buchanan *v.* Alexander, 4 How. 20; Derr *v.* Lubey, 1 Mac Arthur, 187; Pottier & Stymus Manufac. Co. *v.* Taylor, 3 Id. 4; Brown *v.* Finley, Id. 77; Averill *v.* Tucker, 2 Cr. C. C. 514; Bank of Tennessee *v.* Dibrell, (State Comptroller, Garnishee.) 3 Sneed, 379; Pennebaker *v.* Tomlinson, (State Comptroller, Garnishee,) 1 Tenn. Ch. 111; Rollo *v.* Andes Ins. Co. (State Treasurer, Garnishee,) 23 Grat. 509; Divine *v.* Harvie, 7 Mon. 439; Wild *v.* Ferguson, 23 La. Ann. 752, (the garnishees in the latter two cases being State officers;) Wilson *v.* Bank of La. 55 Ga. 98. In the case of Buchanan *v.* Alexander, boarding house keepers had sued seamen and garnished the purser of the frigate Constitution, upon which the sailors had a lien for wages; but the U. S. Supreme Court held that the funds in the hands of that officer could not be thus reached, though he had admitted that the wages were due. "The funds of the government," said the court, "are specifically appropriated to certain national objects, and if such appropriations may be diverted and defeated by State process or otherwise, the functions of the government may be suspended. So long as money remains in the hands of a disbursing officer, it is as much the money of the United States as if it had not been drawn from the treasury. * * We think the question in this case is clear of doubt, and requires no further illustration." Manf. Co. *v.* Taylor, 3 Mac Arthur, 4; Brown *v.* Dist. Col. Id. 77; Deer *v.* Luby, 1 Id. 187.

of the government, they belong to the government and not to the creditors up to the moment when the officer pays them over to the latter; and therefore they cannot be attached in the hands of the officer as the money of the creditors in his possession. Even if States or the federal government were liable to be garnished for what property they hold belonging to an attachment defendant, it would not follow that their own money, though placed in the hands of an officer for payment, could be subjected to garnishment as the money of the defendant to whom such funds are to be paid. However, were such governments garnishable, debts due a defendant might be reached by the process; for, in such case, it is not essential that the money necessary to pay debt should already belong to the defendant. The reason why they cannot be garnished for debt is the broad one that a State cannot be sued; and that reason is based upon public policy, whether the policy be intrinsically wise or unwise. And the reason extends to the garnishment of officers.

The reason has been extended, in the majority of the States, to public corporations of a subordinate character: such as counties, townships, city corporations and school districts. However, where the opposite theory prevails, and also where the question is an open one, as in new States when counties, cities, school districts, etc., are first formed, there may be strong argument drawn from policy, in favor of the garnishment of such corporations. The acknowledged duty of every debtor to pay his debts; the obligation upon government to facilitate the performance of such duty; the injustice of allowing a debtor to defeat a creditor by putting funds or property into the hands of a public corporation to keep them out of the reach of the courts; the almost equal injustice of permitting such corporation to hold a debtor's money or property from the operation of a court's writ, though not put designedly in such position to defeat the creditor, ought to have weight in considering the question of policy.

The arguments generally employed, that such corporations and their officers might be hindered in the discharge of their public duties if liable to be called into the quarrels of litigants to answer what property or funds they hold belonging to an

attachment defendant, and that they cannot always know what is due such defendant until accounts have been adjusted, may be met by the answer that when it is apparent that a stated sum is due him, or that a distinct article of property belongs to him, it is very easy for a public corporation, or its proper officer, to say so—as easy as it is for a private corporation, or its proper officer, to say so, under similar circumstances—(not only easy, but a duty when the law requires it, and therefore no hindrance of official duty;) and, in answer to the other objection—that they cannot always know what is due the defendant till his accounts have been settled, it seems sufficient to say that a response to an interrogatory to that effect would work the discharge of the garnishee. Unless traversed, an answer by a private person that his accounts with the defendant are unliquidated and that he does not know whether he is indebted or not, would result in his discharge unless refuted under traverse. If it be said that public corporations and their disbursing officers ought not to be subjected to the litigation consequent upon a traverse of their answers, the ready reply is that the argument favors statutory exemption from traverse rather than from garnishment. There are good reasons for a provision prohibiting further procedure against a public corporation, cited as garnishee in an attachment suit, after such an answer as above suggested; for if every creditor should have it in his power to derange the ordinary official routine of business by making accounting officers liquidate accounts out of due time, much confusion and public injury might result. With such a provision, almost every objection to the garnishment of subordinate public corporations would be swept away. The public interests would be subserved by the extension of the creditor's means of collecting his just dues and the cause of justice would be promoted.

Where subordinate public corporations may sue and be sued in direct actions the argument drawn from the inviolability of the State does not apply to them; and, considering garnishment as a suit, they ought not be exempt from it on this ground. Besides, State inviolability is not so indisputably commendable that it should be extended to minor organizations which per-

form some of the functions of government. The United States government suffers itself to be sued, upon contracts express or implied, in the Court of Claims. If all governments would allow the courts to settle claims preferred against them, is it likely that less justice would be done than now when such judicial functions are confined to executive officers who act and think through their clerks?

Sec. 2. Counties, &c.

Under the policy followed by most of the States, neither counties, nor their officers, are chargeable by garnishment, upon general principles; they may be rendered amenable by statute, but are not otherwise liable. If a county officer could be cited into court to answer as to what public funds he holds, in a suit between private litigants, he might be hindered in the settlement of his accounts with the county, to the injury of the public interests. For this reason, as well as for one founded upon a statute, it was held that a county treasurer was not chargeable as garnishee or trustee, though he had answered to an interrogatory that he had, in his official capacity, a stated sum of money due to the defendant for services as a juror which he was legally obliged to pay to the defendant.[1] A county officer's authority and duty are governed by law, and he cannot be made to diverge from his rightful official course of action by court orders at the instigation of litigants, in the absence of statutory authorization, and to the detriment of the public welfare, any more than a State officer could thus be turned from the line of his public duty.[2]

A county is deemed a municipal corporation, and its officers held exempt from garnishment an account of public property or

[1] Chealy *v.* Brewer, (Seaver, Trustee,) 7 Mass. 259; Williams *v.* Boardman, 9 Allen, 570.

[2] Ward *v.* County of Hartford, 12 Ct. 404; Bray *v.* Wallingford, 20 Id. 416; McDougal *v.* Hennepin Co., 4 Minn. 184; Bulkley *v.* Eckert, 3 Pa. St. 368; Boone Co. *v.* Keck, 31 Ark. 387; Webb *v.* McCauley, 4 Bush, 8; Ross *v.* Clarke, 1 Dall. 354; Spalding *v.* Imlay, 1 Root, 551; Stanton *v.* Holmes, 4 Day, 87, 96; Benton *v.* Dutcher, 3 Id. 346; Winchell *v.* Allen, 1 Ct. 385; Stillman *v.* Isham, 11 Ct. 124; Wallace *v.* Lawyer, 54 Ind. 501.

money in their hands. Even if the county were garnishable, it is held that the process would not reach an undelivered county order in favor of the debtor, while yet in the hands of the county clerk; and that the delivery of the order to the sheriff, upon service of the process upon the clerk, does not bind the county nor subject it to the garnishment.[1] The clerk, being the agent of the board of supervisors, holding for it, has no custody independent of the board; and the garnishment is virtually against the county, which, as a municipal corporation, cannot be thus reached.[2] A county cannot be directly sued,[3] as a general rule; but when it may be sued, and judgment obtained against it, its debtor may be garnished in execution.[4]

A *quasi* corporation is liable to have the usual legal remedies applied to it, if the law imposes upon it such duties and grants such privileges as require such remedies on the part of others in the enforcement of their rights. It is a proper inference that a statute confers such remedies when it provides that such a corporation may sue and be sued, though none of the conservative writs or any particular form of remedy may be expressed.[5] But a county is not such a corporation. It is more analagous to the State government than to public bodies merely created by statute for designated purposes. A statute authorizing a county to make an appearance when sued was construed not to imply that the county might be sued.[6]

It would seem that when a municipal corporation makes a contract, it ought to be liable to suit or garnishment precisely as a natural person. In Massachusetts, a county may be garnished for a sum due by contract. Although a juror's fees cannot be attached in the hands of the county by such process

[1] Merrell *v.* Campbell, (County Clerk,) 49 Wis. 535.

[2] Id.; Burnham *v.* Fond du Lac, 15 Wis. 193; Buffham *v.* Racine, 26 Wis. 449; Hill *v.* Lacrosse & Mill. R. R. Co. 14 Wis. 291.

[3] Sheldon *v.* Litchfield County, 1 Root, 158; Lyon *v.* Fairfield County, 2 Id. 30; Staphouse *v.* County of New Haven, 1 Root, 126; Hawley *v.* County of Litchfield, Id. 155; Russell *v.* Men of Devon, 2 Term Rep. 667.

[4] George *v.* Ralls Co., 3 McCrary C. C. 181.

[5] Ward *v.* County of Hartford, 12 Ct. 404, 407; McLoud *v.* Selby, 10 Ct. 390; Tilden *v.* Metcalf, 2 Day, 209.

[6] Ward *v.* County of Hartford, 12 Ct. 408.

in that State,[1] the Supreme Court say that, in cases of contract, "there has never been a doubt that cities and towns are liable to be summoned as trustees; and we find nothing in the statutes upon this subject that places counties upon a different footing in this respect from cities and towns."[2]

What has been said about the non-liability of a county and its officers is almost as broadly applicable to a township.[3] Where the rule of non-liability prevails, whether by statute or by settled practice based upon the principles above mentioned with respect to counties, and applicable alike to cities, it is not confined to such cases as would embarrass officers in the discharge of their duty, but is extended to all cases. The question, when such garnishment is attempted, is not whether the process interferes with the political, civil or corporate duties of the officer, but whether the statute, or the policy of the law, allows the garnishment of such a corporation at all.[4] A corporation may waive objection to garnishment, even where there is no express statute authorization for the process against such a body.[5] Waiver, however, ought not be permitted without the consent of the attachment debtor.[6]

Distinction has been drawn, however, between a public officer of such a corporation and a mere agent appointed by a town to distribute money among its inhabitants; and while the former are not chargeable under trustee process, the latter was held to be so when the corporation itself was liable.[7] But, if the corporation is exempt, its agent cannot be garnished though he be a private citizen.[8]

The rule that public corporations, deriving their authority

[1] They can be in New Hampshire: Wardwell *v.* Jones, 58 N. H. 305.

[2] Adams *v.* Tyler, 121 Mass. 380: the case of Williams *v.* Boardman, 9 Allen, 570, distinguished. And the distinction may be extended to Chealy *v.* Brewer, 7 Mass. 259.

[3] Jenks *v.* Osceola Township, 45 Iowa, 554; Spencer *v.* School District (No. 17,) 11 R. I. 537; Bradley *v.* Town of Richmond, 6 Vt. 121; *Contra:* Hibbard *v.* Clark, 56 N. H. 155, 157. See Walker *v.* Cook, 129 Mass. 577.

[4] Jenks *v.* Osceola Township, 45 Iowa, 555.

[5] Clapp *v.* Walker & Davis, 25 Iowa, 315; Los Animas Co. Commissioners *v.* Bond, 3 Col. 441.

[6] School Dist. *v.* Gage, 39 Mich. 484; Johnson *v.* Dexter, 38 Mich. 695.

[7] Wendell *v.* Pierce & Trustees, 13 N. H. 502.

[8] Merrell *v.* Campbell, 49 Wis. 535.

from the law, for the receiving and disbursing of public funds, are not chargeable as garnishees, is applicable to school districts, their commissioners, treasurers and other officers.[1] School districts are considered as municipal corporations[2] and thus brought under the rule of non-liability.[3] They are public corporations.[4] Their officers are to be treated as public officers, and the money in the hands of such officers to be deemed *in custodia legis* and therefore not subject to garnishment.[5]

Sec. 3. Cities.

Though there is not uniformity in the practice, in the several States, with respect to the garnishment of incorporated cities and towns, and their officers, yet the same reasoning may be urged against their garnishment as against counties and other public corporations. City governments control large populations and exercise very important functions. Persons subject to municipal authority feel its operation as sensibly as they do that of the State or federal government. As tax collecting and tax distributing powers, cities bear upon the interests of all their citizens. They exercise, to a great degree, the authority of the State itself, under its surveillance. Almost every argument against the policy of a State's allowing itself to be summoned directly, or indirectly through its officers, to appear in the litigation of others in which it has no interest, will apply to the case of a municipal corporation.

[1] School District *v.* Gage, 39 Mich. 484; Spencer *v.* School District No. 17, 11 R. I. 537; Bivens *v.* Harper, 59 Ill. 21; Millison *v.* Fisk, 43 Id. 112; Clark *v.* Mobile School Commissioners, 36 Ala. 621; Tracy *v.* Hornbuckle, 8 Bush, 336; Bulkly *v.* Eckert, 3 Pa. St. 368; Fourth School District in Rumford *v.* Wood, 13 Mass. 193-8-9; Thayer *v.* Tyler, 5 Allen, 95; Colby *v.* Coates, 6 Cush. 559; Hightower *v.* Slaton, 54 Ga. 108; McLellan *v.* Young, Id. 399, and 21 Am. Rep. 276; Hadley *v.* Peabody, 13 Gray, 200: the last three cases cited being to the effect that a teacher's salary cannot be the subject of garnishment. Ross *v.* Alleu, 10 N. H. 96, supports the same proposition. See Johnson *v.* Pace, 78 Ill. 143.

[2] School District, etc. *v.* Gage, 39 Mich. 484; Seely *v.* Board of Education, Id. 486: both upon construction of statute.

[3] *Id.*

[4] Trustees of Schools *v.* Tatman, 13 Ill. 27.

[5] Millison *v.* Fisk, 43 Ill. 112, reaffirmed in Bivens *et al.* School Directors *v.* Harper, 59 Ill. 21.

It is true, a State offers some reasons for not being directly sued without its consent, which a city cannot urge; but the reason against being garnished, which is usually advanced, that it would hinder officers in the discharge of their duties and work to the injury of the public interest is equally applicable to cities and their servants. That creditors should be allowed the facility which garnishment gives for the collection of their dues, is less important than that public duties be perfectly performed. Officers might be harrassed daily, and drawn from their posts of duty to the courts, to appear in suits against the many employees which a city must owe from time to time if they were chargeable as garnishees for public funds in their hands. A city is a public corporation, existing for the public good. Upon these and other considerations it has been held that a city is not amenable to garnishment, in the absence of statutory provision creating liability.[1] And for the same reasons, it is held that money in the official possession of a municipal officer is not garnishable.[2]

[1] Merrell *v.* Campbell, 49 Wis. 535, (in a case against a county;) People *v.* Mayor, etc., 2 Neb. 166; Merwin *v.* City of Chicago, 45 Ill. 133; City of Chicago *v.* Halsey, 25 Ill. 596; Jenks *v.* Osceola Township, 45 Iowa, 554; Fortune *v.* St. Louis, 23 Mo. 239; Hebel *v.* Amazon Ins. Co. 33 Mich. 407; Hawthorne *v.* St. Louis, 11 Mo. 59. (See Pendleton *v.* St. Louis, 49 Mo. 565;) Edgerton *v.* Third Municipality of New Orleans, 1 La. Ann. 435; Wallace *v.* Lawyer, 54 Ind. 501; Parsons *v.* McGavock, 2 Tenn. Ch. 581; Moore *v.* Mayor of Chattanooga, 8 Heisk. 850; Memphis *v.* Laski, 9 Id. 511; Bank *v.* Dibrell, 3 Sneed, 382; Baltimore *v.* Root, 8 Md. 95; McDougall *v.* Board, etc., 4 Minn. 184; Callaghan *v.* Pocasset Manufac. Co. 119 Mass. 173; Todd *v.* Birdsall, 1 Cow. 260; Burnham *v.* Fond du Lac, 15 Wis. 193, reaffirmed in Buffham *v.* Racine, 26 Id. 449; Wilson *v.* Lewis, 10 R. I. 285; Adams *v.* Barrett, 2 N. H. 375; Beckwith *v.* Baxter and Trustee, 3 Id. 67; Bradley *v.* Richmond, 6 Vt. 121; Divine *v.* Harvie, 7 T. B. Mon. 440; City of Erie *v.* Knapp, 29 Pa. St. 173; Greer *v.* Rowley, 1 Pittsburgh, 1; McClellan *v.* Young, 54 Ga. 399; Maryland *v.* Balt. & O. R. R., 12 Gill & J. 399; Mobile *v.* Rowland, 26 Ala. 498; President of Union Turnpike Co. *v.* Jenkins, 2 Mass. 37; Pittstown *v.* Plattsburgh, 18 Johns. 407, 418.

[2] Wallace *v.* Lawyer, 54 Ind. 501; Triebel *v.* Colburn, 64 Ill. 376; Hadley *v.* Peabody, 13 Gray, 200; Ward *v.* County of Hartford, 12 Ct. 404; Erie *v.* Knapp, 29 Pa. St. 173; Moore *v.* Mayor of Chattanooga, 8 Heisk. 850; Memphis *v.* Laski, 9 Id. 511; Edmundson *v.* De Kalb Co. 51 Ala. 103. (See Rodman *v.* Musselman, 12 Bush, 354; Lightner *v.* Steinagal, 33 Ill. 510; Millison *v.* Fisk, 43 Ill. 113.

A creditor of a city officer, in an attachment suit against such officer, cannot make the comptroller of the municipal corporation a garnishee.[1] The funds the comptroller holds are the city's till paid over, and not held by him in the capacity of a debtor or agent of the man to whom they are due. The general rule is that salaries of municipal officers are not garnishable, and it has been extended to the wages of employees;[2] and where this prevails, a city, though it may be there generally garnishable, would not be, in a suit for such dues.

When summoned, a city held money of the defendant under special agreement that it should be applied to the payment of his taxes. Under such circumstances, the money was not liable to garnishment. But when the city answered, the money, still in the city-garnishee's hands, was no longer held for the taxes —they having been paid meanwhile. On the principle that the validity of a garnishment must be determined by the state of things existing at the time of the summons, the city was held not liable.[3]

It is not everywhere settled, however, that municipal corporations, directly or through their officers, are free from liability to garnishment. Courts, in enforcing positive statutes, construing doubtful ones, and sometimes in applying general principles, have held such bodies and their representatives chargeable as garnishees.[4] Under a statute which subjected "any person, body politic or corporate" to process for the recovery

[1] Waldman *v.* O'Donnell, 57 How. Pr. 215.

[2] Keyser *v.* Rice, 47 Md. 203.

[3] O'Brien *v.* Collins, 124 Mass. 98. On the other hand, a tax payer cannot be garnished by the creditor of a municipal corporation for the amount of his taxes. This was held to be the rule, even when the taxpayer had given his note and the city had obtained judgment thereon. Underhill *v.* Calhoun, 63 Ala. 216. But see Smoot *v.* Hart, Id. 69.

[4] Mayor, etc. *v.* Horton, 38 N. J. L. 88; Whidden *v.* Drake, 5 N. H. 13; Bray *v.* Wallingford, 20 Ct. 416; Wales *v.* City of Muscatine, 4 Iowa, 302; Speed *v.* Brown, 10 B. Mon. 108; Pendleton *v.* Perkins, 49 Mo. 565; Wilson *v.* Lewis, 10 R. I. 285; Rodman *v.* Musselman, 12 Bush, 354; (See Heibner *v.* Chave, 5 Barr, 15.) (See Pendleton *v.* Perkins & City of St. Louis, 49 Mo. 565, and Neuer *v.* O'Fallon, 18 Mo. 277.) In Massachusetts, "there has never been a doubt that cities and towns are chargeable as trustees" in cases of contract: Adams *v.* Tyler, 121 Mass. 380.

of salaries of its officers, at the suit of creditors, it was held that cities are included,[1] but the general rule is that public corporations are not garnishable, though the statute should expressly authorize the process against "all persons *and corporations.*" The opinion prevails that municipal corporations must be expressly mentioned if they are to be made garnishable by statute; and that view will be found generally held by the courts except in the States where it is the settled practice to hold such bodies garnishable.

In the interpretation of statutes authorizing the garnishment of *persons* without naming corporations, it has been argued that the latter are not included, and that this appears from the requirement that the answers must be under oath; and, for this reason, a town was held not amenable to garnishment.[2] There would seem to be no difficulty about the affidavit, if artificial persons are intended under the general term, since corporations always act and speak and swear by their officers.[3] The reasoning with respect to the oath that would exclude public, would also exclude private corporations from the intendment of the statute.

When municipal corporations are garnishable, they are subject to the rules governing private garnishees, but there are commonly statutory exceptions in favor of officers and employees, policemen, agents, etc.[4] They are not liable to the process on a claim which could not be made a cause of action against them in a direct suit by their immediate creditor.

Sec. 4. Private Corporations.

Artificial persons of private character are subject to garnishment precisely as natural persons.[5] A corporation speaks

[1] City of Newark *v.* Funk, 15 Ohio St. 462.

[2] Bradley *v.* Town of Richmond, 6 Vt. 121; Union Turnpike Road *v.* Jenkins, 2 Mass. 37.

[3] Oliver *v.* C. & A. R. R. Co. 17 Ill. 587; Head *v.* Merrill, 34 Me. 586; Bushel *v.* Commonwealth Ins. Co. 13 S. & R. 173; Callahan *v.* Hallowell, 2 Bay, 8; South Carolina R. R. Co. *v.* McDonald, 5 Ga. 531; Branch Bank *v.* Poe, 1 Ala. 396; Cook *v.* Walthall, 20 Ala. 334.

[4] Keyser *v.* Rice, 47 Md. 203.

[5] Knox *v.* Protection Ins. Co. 9 Ct. 430.

through its president or other representative officer, and may thus answer interrogatories under oath as well as any other third person holding assets of the defendant or indebted to him. Liable to direct suit, it is liable to the side action by which it is summoned into court to declare its position, and it may be ordered to pay over what it has, just as any other garnishee may be.[1] The summons must be directed to, and served upon, the corporation itself; upon such officer as it puts forward to represent it as a body; not upon any officer thereof, since the summons might thus be binding only on the subordinate and not legally bring the corporation itself into court.[2]

Although in an attachment suit against a private corporation the treasurer of that corporation cannot be made a garnishee and the funds he officially holds attached in his hands,[3] yet in a garnishment proceeding against such body the sworn answer may be by the treasurer if authorized to represent it.[4]

Only what a bank holds of the defendant's property, or what it owes him, can be reached by garnishment. It does not hold the stock of a stockholder of its corporation in such a sense as to be liable to garnishment therefor. The same is true of any other corporation with regard to any part of its own stock owned by the defendant. The stock may be attached as the property of the defendant, but it cannot be reached by garnishment served upon the corporation itself through its official head.[5]

A corporation cannot be successfully garnished upon the showing that the attachment defendant had done work for it, and that its books indicate a balance in his favor; there should

[1] Balt. & Ohio R. R. Co. *v.* Gallahue, 12 Grattan, 655; Boyd *v.* Chesapeake & Ohio Canal Co. 17 Md. 195; Taylor *v.* Burlington & Mo. R. R. Co. 5 Iowa, 114; Wales *v.* Muscatine, 4 Iowa, 302; Knox *v.* Protection Ins. Co. 9 Conn. 430; Trenton Banking Co. *v.* Haverstick, 6 Halsted, 171.

[2] Wilder *v.* Shea, 13 Bush, 128; Kennedy *v.* H. L. & S. Society, 38 Cal. 151; Claflin *v.* Iowa City, 12 Iowa, 284; Clark *v.* Chapman, 45 Ga. 486; Harris *v.* Somerset & Ken. R. R. Co. 47 Me. 298; Greer *v.* Rowley, 1 Pittsburgh, 1; Davidson *v.* Donovan, 4 Cr. C. C. 578.

[3] Mueth *v.* Schardin, 4 Mo. App. 403.

[4] Chicago Rock Is. R. R. Co. *v.* Mason, 11 Ill. App. 525.

[5] Ross *v.* Ross, 25 Ga. 297; Planters & Merchants Bank *v.* Leavens, 4 Ala. 753.

be the further showing that such balance is due and payable to the defendant.[1] It should be made to appear that the corporation has a definite sum of money in hand belonging to the defendant which it cannot justly retain, which is the rule when a natural person is subjected to garnishment,[2] or that it is unconditionally indebted to him, or holds property of his, according to the general rule.

A bank receiving funds belonging to a firm known to be insolvent, in payment of a note due by one member of the firm, may be garnished as the holder of funds of the firm, in an attachment suit against such insolvent partnership.[3] Knowledge, on the part of the bank, that a sum paid to it was not the money of its debtor, would make it a party to the fraud thus perpetrated upon the creditors of the insolvent firm. The bank would thus become the unlawful holder of that which was the common pledge of the creditors before the attachment, and of that upon which the attachment creditor had a hypothetical lien after the attachment and garnishment.

The indebtedness of an insurance company upon a policy may be reached by garnishment.[4] But if there has been a loss by fire and, by the terms of the policy, the company has the right to rebuild, it would not be liable as garnishee in a suit against the insured by his creditor.[5] It is not liable in a suit against the husband when the insurance is due to his wife.[6]

The agents of an insurance company cannot be garnished for

[1] Hewitt *v.* Wagar Lumber Co. 38 Mich. 701.

[2] De Graff *v.* Thompson, 24 Miss. 452.

[3] Johnson *v.* Hersey, 70 Me. 74.

[4] The Rhode Island Ins. Assoc. had an agency in Illinois and another in Wisconsin, and was garnished in both States by the same attachment creditor to reach a policy debt due the defendant in the suits. The indebtedness was on a policy of insurance upon the defendant's property in Wisconsin and was there exempt by statute; still the company was held as garnishee in Illinois. Roche *v.* R. I. Ins. Assoc., 2 Ill. App. 360. It is considered no defense, in Wisconsin, against the garnishment process, that the garnishee's indebtedness to the defendant is payable in another State where the defendant resides, if the court has obtained jurisdiction over the defendant. Commercial Bank *v.* Chicago, M. & St. P. R. R. Co., 45 Wis. 172.

[5] Godfrey *v.* Macomber, 128 Mass. 188; Thorp *v.* Preston, 42 Mich. 511.

[6] Houghton *v.* Lee, 50 Cal. 101.

debts due by the company to the attaching creditor, unless they have property or funds of the company in hand.[1]

It was held in Virginia that an insurance company, incorporated under United States laws, though complying with the law of that State in relation to foreign insurance companies doing business therein, (Va. Code, 1873, Ch. 36, § 19,) is subject to foreign attachment.[2]

A common carrier may be liable as a garnishee, if he have funds of defendant in hand. He has been held liable, though the funds were payable in another State.[3] If he has property undergoing transportation, and it is not within the county where the garnishment is issued, though within the State, he is not liable.[4]

The baggage which a passenger on a railroad car is taking with him on a journey, remains so far in his own possession that he may present his check at any time and have his trunk, valise, etc., delivered to him, though at a point short of the terminus. He may have checked through, yet may have concluded to stop over at an intermediate station, and to have his baggage stop with him. It would seem therefore that the baggage, though given to the railroad company for transportation, is still in the owner's possession. It is in much the same condition as when given to an expressman at the end of the journey to be taken to a hotel; or as when a carpet-sack is entrusted to a boy to be taken to the passenger's stopping place while he walks by the side of the passenger. No one would think the expressman or the errand boy subject to garnishment as the possessor of the passenger's property. He has such custody as would render him liable for any injury attributable to improper keeping. The express company, which takes trunks from the railroad depot to hotels, is certainly responsible for

[1] Daniels *v.* Mienhard, 53 Ga. 359.

[2] Cowardine *v.* Universal Life Ins. Co. 32 Gratt. 445.

[3] Adams *v.* Scott, 104 Mass. 164. But see Bottom *v.* Clark, 7 Cush. 487; Whipple *v.* Robbins, 97 Mass. 107; Edwards *v.* Transit Co. 104 Mass. 159; Clark *v.* Brewer, 6 Gray, 320.

[4] Ill. Cent. R. R. *v.* Cobb, 48 Ill. 402. It was held that non-resident common carriers are not liable to foreign attachment for losing a trunk within the State: Porter *v.* Hildebrand, 14 Pa. St. 129.

any abuse of the articles in the conveyance, but the possession is so temporary and so qualified that the trunks cannot be subjected to garnishment in such company's hands unless it holds them under conditions different from those that are usual. As the keeper of a livery stable cannot be subjected to garnishment because horses of the defendant in an attachment suit are kept in his stable, so a like temporary possession of trunks for transportation from depot to hotel, with like liability to have the owner take possession at will, ought not to subject the carrier to garnishment should a creditor of the passenger seek to attach them. The trunks may be attached—the horses in the livery stable may be—but not attached in the hands of third persons under the circumstances suggested. They may be seized by the sheriff as in the hands of the defendant, and taken directly into the sheriff's custody.[1]

The possession which the treasurer of a private corporation has of the corporation's funds is not such as to render him liable to garnishment therefor, in an attachment suit against the corporation.[2] Money of a railroad company, in the hands of a fiscal agent, has been held not to be garnishable by a creditor of the company.[3] Railroad bonds, in the hands of a trustee, to be given to stockholders in exchange for certificates of stock, were held to be subject to the debts of the railroad company and garnishable in the trustee's hands.[4]

[1] Hall *v.* Filter Manf. Co. 10 Phila. 370; Western R. R. Co. *v.* Thornton, 60 Ga. 300. In this case, a local agent of the company was summoned as garnishee to hold in his hands the trunk of a passenger who was defendant in the attachment suit. The decision was not that the company could not have been made a garnishee but that the agent was not liable because it had not been proved that he had any power to dispose of the trunk at the depot where he was stationed. Even to this ruling there was dissent. When it is further stated that the passenger was accompanying his own baggage, *en route* from Columbus to West Point in Georgia, it would seem clear enough that the local agent at the end of the route had not such possession as would render him liable as a garnishee; and it ought to be as clear that the company itself would not have been liable. A railroad company was held not liable as garnishee because of possessing borrowed cars. Mich. Cent. R. R. *v.* Chicago &c. R. R. Co. 1 Ill. App. 399.

[2] Mueth *v.* Schardin, 4 Mo. App. 403.

[3] Wilder *v.* Shea, 13 Bush, 128.

[4] Warren *v.* Booth, 51 Iowa, 215.

A railroad company, operated in Ohio, may have garnishment process served upon it as if it were a domestic corporation, though incorporated by another State.[1]

If a company mortgage its railroad to bond-holders, yet retain the right to possess and operate it and receive the profits, its earnings are garnishable by ordinary creditors.[2]

There is a class of persons who have such intimate relations with their principals that they should not be treated as third persons so as to be liable to garnishment in suits against their principals. The ticket-agent of a railroad company, theatre, etc., may hold money temporarily, collected for the corporation which he acts for, but he would not be liable to garnishment in a suit against such corporation. The same may be said of the receiving or paying teller of a bank, who momentarily handles funds for the bank. A keeper of a toll gate, who makes daily returns of his collections, should also be deemed exempt from liability to garnishment. Many other illustrations will readily occur to the legal reader.[3]

But there are other cases in which servants of corporations and other principals should be considered garnishable, since otherwise great wrong might be done by collusion between them and the debtor-defendants. The captain, purser or clerk of a steamer may have large funds in hand upon the close of a voyage, and, if not liable to garnishment, the owners of the steamer and the rightful proprietors of the funds might have the custodian keep them just to prevent the plaintiff from making his money. In such case, the captain, purser or clerk, in possession of the money, could be reached by garnishment in aid of an attachment lien.

It might be said that the captain is but the right hand of the owners, as the officer of a bank is of the corporation which he

[1] Pa. R. R. Co. *v.* Peoples, 31 Ohio St. 537.

[2] Miss. &c. R. R. Co. *v.* U. S. Express Co., 81 Ill. 534.

[3] Mueth *v.* Schardin, 4 Mo. App. 403; Nichols *v.* Goodheart, 5 Ill. App. 574; McDonald *v.* Gillet, 69 Me. 271; Pettingill *v.* Andr. R. R. Co. 51 Id. 370; Sprague *v.* Steamboat Nav. Co. 52 Id. 592; Fowler *v.* Pittsburg &c. R. R. Co. 35 Pa. St. 22; Farmers' &c. Nat. Bank *v.* King, 57 Id. 202. Ticket-agent held liable: Littleton Bank *v.* Portland &c. R. R. Co. 58 N. H. 104. In Central Plank Road *v.* Sammons, 27 Ala. 380, toll-keeper held liable.

serves. Sufficient difference of position may be discernible to show that the former would be liable to garnishment, in the case supposed, while the latter would not be; but very nice cases are constantly occurring in practice in which the courts are obliged to come to conclusions by consideration of the peculiar facts in each and not by any general rule.

Were it true that shares of a stockholder can ordinarily be reached by the garnishment of the corporation in which they are held, in a suit against himself,[1] it may safely be said that shares owned by a non-resident, in a foreign corporation, cannot be reached by serving notice on a secretary or other officer of such body who may keep an office within the jurisdiction. The notice may be complete, such as would prove efficient if the shares were within the jurisdiction and under the control of the officer, but the insurmountable difficulty is that the shares are in another State. They have not even a constructive presence at the place where the officer is found. By no legal intendment can they be there when they are really elsewhere and liable to attachment where they are.

It does not affect the *situs* of the shares when the foreign corporation does business in several places; it does not give the shares a *situs* in every place where the business is done. It has been held that a corporation does not have a multiplicity of domiciles because it does business in many places; that its existence is owing to its legislative creation, and it cannot overleap the boundary of the State which gave it being. "We regard the principle to be too firmly settled by repeated adjudications of the Federal and State courts, to admit of further controversy, that a corporation has its domicile and residence alone within the boundaries of the sovereignty which created it, and that it is incapable of passing personally beyond that jurisdiction,"[2] say the Court of Appeals of New York.

This doctrine formerly was carried so far as to preclude any

[1] It has been held that they cannot: Ross *v.* Ross, 25 Ga. 297; Planters' & Merchants' Bank *v.* Leavens, 4 Ala. 753. And that they can be: Chesapeake R. R. Co. *v.* Paine, 29 Gratt. 502; In Re Glen Iron Works, 17 Fed. Rep. 324.

[2] Plimpton *v.* Bigelow, 93 New York, 598, (citing Bank of Augusta *v.* Earle, 13 Pet. 519; Lafayette Ins.

action against a corporation on a personal demand except in the State of its creation. It was held that it dwelt at home and could not "migrate to another sovereignty;" that its officers could not carry their corporate functions with them when crossing the line from the State of its domicile; that there was no mode to compel its appearance at any court beyond the State in which the corporation was chartered.[1] The doctrine was narrow and prejudicial to commerce; it worked to the detriment both of corporations and their creditors. Some courts therefore, though holding the general doctrine, excepted corporations which sent officers into another State to transact corporation business there.[2] This exception has crystalized into statute law in many States; and now it is generally held to be the prevailing doctrine.[3]

The consent of the State into which a foreign corporation sends officers and does business, is necessary; and, in granting it, conditions may be imposed.[4] The conditions obviously must be constitutional, consonant with the maintenance of the jurisdiction of each State from encroachments, and such as will give foreign corporations the opportunity of defending suits just as natural persons must be afforded such opportunity.[5]

If the conditions imposed upon a foreign corporation go beyond these restrictions; if they nominally authorize service upon a private member, or even an officer of a foreign corporation who is not authorized by it to represent the body, when found within the State in which the suit is brought and in which the corporation is not chartered, they would virtually deny notice to the defendant and thus cut him off from any opportunity of defense.

The corporate entity cannot travel from one State to another,

Co. *v.* French, 18 How. (U. S.) 404; Merrick *v.* Van Santvoord, 34 N. Y. 208; Stevens *v.* Phœnix Ins. Co., 41 Id. 150;) Mayer *v.* Liverpool Ins. Co. 49 Md. 595.

[1] McQueen *v.* Middleton Man. Co. 16 Johns. 5; Peckham *v.* North Parish in Haverhill, 16 Pick. 274.

[2] Libbey *v.* Hodgdon, 9 N. H. 394; Moulon *v.* Trenton Ins. Co. 24 N. J. L. 222.

[3] Barr *v.* King, 96 Pa. St. 485; Darlington *v.* Rogers, 13 Phila. 102.

[4] Paul *v.* Virginia, 8 Wall. 168; Lafayette Ins. Co. *v.* French, 18 How. 404.

[5] Id.; Newell *v.* Great Western Railway Co., 19 Mich. 344.

but it can authorize an agent to represent it beyond its home, and no other power can appoint such agent. If one of its officers is doing business for it in a State which has given its consent upon the condition that such officer thus engaged may be served with process binding on his principal, doubtless he may be legally served so as to bind the corporation; but if he is there on his own account merely, the foreign-chartered body cannot be served by the service upon him, officer of the corporation though he be.[1]

The reasoning which shows that foreign corporations must have summons served on their own constituted representatives in personal actions, is just as applicable and forcible when the suit is only nominally personal but is in effect against their property, (an attachment suit.) In either case there must be either summons or publication notice, and thus opportunity for defense accorded.[2]

A corporation may sue and be sued in a State other than that of its domicile, where it does business and has an officer representing it who may be served with process.[3] But its liability to suit there is no argument to prove that its property, situated at its domicile, is constructively in the State and liable to be attached. Nor is it any argument that a non-resident who owns stock in the corporation at its domicile, has such stock constructively wherever elsewhere the corporation may have established an agency, so as to render it attachable as his property in every such place.

If a corporation may be deemed a creditor of the share-holder wherever it has established an agency and placed officers so that it may there sue and be sued; and if, under such circumstances, by reason of statutory provisions, the credit may be subject to the garnishment process in a case of foreign attachment against

[1] Id.; St. Clair *v.* Cox, 106 U. S. 350, 358.

[2] Id. p. 351: "No question was raised" on this point.

[3] Gibbs *v.* Queen Ins. Co. 63 N. Y. 114; 20 Am. Rep. 513; Lafayette Ins. Co. *v.* French, 18 How. (U. S.) 404; Jones *v.* N. Y. & Erie R. Co. 1 Grant, 457; Fithian *v.* N. Y. & Erie R. Co. 31 Pa. St. 114; McAllister *v.* Pa. Ins. Co. 28 Mo. 214; Brauser *v.* New Eng. Ins. Co. 21 Wis. 506.

the non-resident stockholder,[1] it does not follow that the shares could be directly attached as *things* within a jurisdiction other than their own *situs;* in other words, to quote again from Plimpton *v.* Bigelow, (*supra*): "Manifestly the *res* cannot be within the jurisdiction, as a mere consequence of a legislative declaration, when the actual locality is undeniably elsewhere. * * * Whatever view may be taken as to the right to attach a debt owing by a foreign corporation to a non-resident, by service of notice on an agent of the corporation within the jurisdiction, we think, in respect to corporate stock, which is not a debt of the corporation in any proper sense, it would be contrary to principle to hold that it can be reached by such a notice. We are therefore of the opinion that the fundamental condition of attachment proceedings, that the *res* must be within the jurisdiction of the court in order to an effectual seizure, is not answered in respect to shares in a foreign corporation by the presence here of its officers, or by the fact that the corporation has property and is transacting business here and that section 647, [of the N. Y. Code, which they were expounding] must be construed as applying to domestic corporations only."[2]

An intangible interest may be the *res* of a direct attachment suit as well as a tangible thing.[3] The difference in the method of seizure does not render the one more liable to attachment than the other. Either may be reached by direct attachment or by garnishment, depending solely on its custody—whether in the hands of the defendant or in those of a third person. Either may be made the *res* of an attachment suit, if it is within the jurisdiction; neither can be, (on any general principle,) if it is without the jurisdiction. Garnishment process cannot

[1] Barr *v.* King, 96 Pa. St. 485; National Bank *v.* Huntington, 129 Mass. 444.

[2] The court cited Moore *v.* Gennett, 2 Tenn. Ch. 375; Christmas *v.* Biddle, 13 Pa St. 223; Childs *v.* Digby, 24 Id. 26; Drake on Attachment, § § 244, 471, 478, to support the doctrine as a general principle; and, to show that the defendant might have the attachment vacated: Dunlop *v.* Patterson Fire Ins. Co. 74 N. Y. 145; 30 Am. Rep. 283; Blossom *v.* Estes, 84 N. Y. 617.

[3] A claim against a railroad company for damages, etc., is not subject to attachment: Selheimer *v.* Elder, 98 Pa. St. 154.

be prosecuted without a *res* any more than direct process of attachment can. If a credit is subjected to garnishment, that is the intangible *res* which is proceeded against. If some right susceptible of seizure only by notice is held directly by the defendant, it may be the intangible *res* that is proceeded against. So the doctrine that shares in a corporation cannot be attached when they are located beyond the jurisdiction should be extended to "intangible interests" and to credits, either located or payable there as the case may be; and it is difficult to conceive how any legislature can effectually declare any property whatever to be in a different place from that which it really occupies.

In a case of foreign attachment, in which the non-resident debtor is not served and does not appear, though notified by publication; and in which a creditor of the defendant, being garnished, answers that he owes the defendant, if that credit thus attached in third hands is not the *res* of the suit, against what does the attaching creditor proceed? And if the credit is amenable only to a foreign jurisdiction, how can the court be said to have jurisdiction over it? It would be precisely as if the garnishee had answered that he held, in his possession and under his control, tangible property in another State, belonging to the defendant. The credit is attachable when it has followed the person garnished and has thus come within the jurisdiction; when it is collectible within the jurisdiction. Its liability is governed by precisely the same principle which governs that of things susceptible of manipulation.[1]

If the court's jurisdiction is confined to a county, service on

[1] "Credits, choses in action and other intangible interests are made by statute susceptible of seizure by attachment. The same principle, however, applies in this case as in the other; the *res*, that is, the intangible right or interest, to be subject to the attachment, must be within the jurisdiction * * * The principle [is] found in the codes of all enlightened nations, that jurisdiction, to be rightly exercised, must be founded upon the presence of the person or thing, in respect to which the jurisdiction is exerted, within the territory. (Story's Confl. of Laws, § § 532, 592, *a;* Gibbs *v.* Queen Ins. Co. 63 N. Y. 114; 20 Am. Rep. 513; Street *v.* Smith, 7 W. & S. 447.) *Plimpton v. Bigelow*, 93 N. Y. 596, 597.

a railroad company creates no lien upon property not within the county at the time.[1]

Where the jurisdiction of the court is established, there can be no doubt that a stock subscriber who has not paid may be garnished as the debtor of the corporation which has sold him the stock, in an attachment suit, foreign or domestic, against the corporation.[2] And he is chargeable for unpaid calls on assessments.[3]

As the receiver for a foreign corporation, appointed in the State where such body is domiciliated, must make himself a party to the suit in the State where it is instituted against property of such corporation, before he can plead and defend against the attachment,[4] so he must be duly qualified to represent the corporation before it can be garnished through him.

Though the corporation may legally designate some minor officer upon whom process may be served, or authorize such officer to answer when the service may have been on another, a minor officer not thus designated cannot be made the representative of the body at the will of the attaching creditor, nor at his own will; and therefore neither service upon him nor acceptance thereof, nor even his appearance, can bind the corporation without its assent,[5] either as defendant or garnishee.

[1] Sutherland *v.* Peoria Bank, 78 Kan. 250.

[2] Meints *v.* East St. Louis Rail Mill Co. 89 Ill. 48; Pease *v.* Underwriters' Union, 1 Ill. App. 287; Langford *v.* Ottumwa Water Power Co. 59 Iowa, 283.

[3] Faull *v.* Alaska G. & S. M. Co. 8 Sawyer, 420; Bingham *v.* Rushing, 5 Ala. 403; Pease *v.* Underwriters' Union, 1 Ill. App. 287; Hays *v.* Lycoming Fire Ins. Co. 99 Pa. St. 621.

[4] S. C. R. R. *v.* People's Saving Institution, 64 Ga 18.

[5] Duke *v.* R. I. Locomotive Works, 11 R. I. 599; Varnell *v.* Speer, 55 Ga. 132; Clark *v.* Chapman, 45 Ga. 486; Daniels *v.* Meinhard, 53 Id. 359; Claflin *v.* Iowa City, 12 Iowa, 284; Raymond *v.* Rockland Co. 40 Ct. 401; Greer *v.* Rowley, 1 Pittsburg, 1; Kennedy *v.* H. L. & S. Society, 38 Cal. 151.

CHAPTER VIII.

RETURN AND PUBLICATION.

§ 1. Description of Attached Property.
2. Requisites of the Return.
§ 3. Amendments.
4. Garnishment Return.
5. Publication Notice.

Sec. 1. Description of Attached Property.

The officer who has executed the writ must account, within the time specified therein, to the court, in writing, showing whether he has seized any property; what he has seized; that it belongs to the defendant; how and when he took it from the defendant, or how and when he attached in the hands of third persons, and all essential matters.[1] The court takes its knowledge of the actual attachment from the sheriff or other seizing officer's official report of it; that is an indispensable link in the chain of the proceedings; and the officer should make the statement full and clear, but no form is prescribed and technical accuracy is not required.[2]

The important matter is certainty and a substantial compliance with the law.[3] Thus, the recitation of the affidavit should be made if the statute requires it;[4] and any requirement as to

[1] Page *v.* Generes, 6 La. Ann. 551; Stockton *v.* Douney, Id. 581; Nichols *v.* Patten, 18 Me. 231; Desha *v.* Baker, 3 Ark. 509; Gibson *v.* Wilson, 5 Id. 422; Willard *v.* Sperry, 16 Johns. 121; Bryan *v.* Trout, 90 Pa. St. 492; Moore *v.* Kidder, 55 N. H. 488; Wilder *v.* Holden, 24 Pick. 8; Paine *v.* Farr, 118 Mass. 74; Moore *v.* Coates, 43 Miss. 225.

[2] Rowan *v.* Lamb, 4 Greene, 468; Byrd *v.* Hopkins, 8 Sm. & M. 441; Bannister *v.* Higginson, 15 Me. 73; Baldwin *v.* Conger, 17 Miss. 516.

[3] Pond *v.* Baker, 55 Vt. 400; Bucklin *v.* Crampton, 20 Id. 261; Thompson *v.* Eastburn, 16 N. J. L 100; Meuley *v.* Zeigler, 23 Tex. 88; Stodart *v.* McMahan, 35 Id. 267; Saunders *v.* Columbus, &c., Ins. Co. 43 Miss. 583; Tucker *v.* Byars, 46 Miss. 549; Rankin *v.* Dulaney, 43 Miss. 197; Wharton *v.* Conger, 17 Miss. 510; Ezelle *v.* Simpson, 42 Id. 515; Jeffries *v.* Harvie, 38 Id. 97.

[4] Woodley *v.* Shirley, Minor, 14.

the defendant's ownership of the property, description, valuation, time and manner of attaching, *etc.*, must be obeyed; but, in the absence of express statutory injunctions on these subjects with respect to the return, all that is necessary is an honest report showing obedience to the writ.

The fact that the property was seized as that of the defendant should plainly appear, if not definitely stated.[1] Should the return fail to state this fact, yet aver that the attachment was made in obedience to the writ, there is an implication that the property was seized as that of the defendant.[2] And officers have been allowed to make the statement definite, in this respect, by emendation after filing.[3]

There is no important conflict of decisions on this subject. It is well settled that if the statute makes it sacramental that the officer must definitely state that the property belongs to the defendant, he must comply; that if it does not, no direct statement is necessary, if there is shown a substantial obedience to the writ; that the statement of ownership is conclusive only of the fact that the property was seized as that of the person named; that the question of ownership is yet open for contest between those interested in its assertion or denial, and that the plaintiff is not to lose the benefit of his attachment because the defendant was not definitely named as the owner in the return.

The defendant who has been summoned, or who has appeared, cannot deny that the property seized is his,[4] nor complain that the officer did not report it to be his. If, however, he is noti-

[1] Repine *v.* McPherson, 2 Kan. 340; Anderson *v.* Scott, 2 Mo. 15; Maulsby *v.* Farr, Id. 438; Ridgeway *v.* Farr, Id. 440; Mason *v.* Anderson, 3 Mon. 293; Clay *v.* Neilson, 5 Randolph, 596; Stoddart *v.* McMahon, 35 Tex. 267.

[2] Miller *v.* Fay, 40 Wis. 633; Johnson *v.* Moss, 20 Wend. 145; Porter *v.* Pico, 55 Cal. 165; Bickerstaff *v.* Patterson, 8 Port. 245; King *v.* Bucks, 11 Ala. 217; Thornton *v.* Winter, 9 Id. 613; Lucas *v.* Goodwin, 6 Id. 831; Saunders *v.* Columbus Life Ins. Co. 43 Miss. 583; Kirksey *v.* Bates, 1 Ala. 303; Miller *v.* McMillan, 4 Id. 527.

[3] Mason *v.* Anderson, 3 T. B. Mon. 293; Anderson *v.* Scott, 2 Mo. 15; Bank of North West *v.* Taylor, 16 Wis. 609.

[4] Campbell *v.* Robert Morris, 3 Harris & McHenry, (Md.) 553.

fied only by publication and does not appear, and if it were good law that any property of his can be executed to effectuate a judgment against him under such circumstances,[1] he would be interested afterwards in showing that the attached property was not his and that publication alone did not give jurisdiction. So, a purchaser, defending an ejectment suit, is vitally interested in the question whether the attached and condemned property belonged to the attachment defendant. But, in neither case can the officer's return be taken as proof of the fact. Both may be concerned as to his return of ownership, with regard to the validity of the attachment; for if it is reported as belonging to any other person than the defendant, the attachment is void.

The proceeding being *in rem* with limited notice and effect cannot hold as one against a thing irrespective of persons.

Whether the defendant is in court or not, it ought to make no difference with regard to the importance of stating in the return the fact that the property attached belongs to him. The attachment's validity does not depend upon his being served or being in court. If invalid, his appearance does not necessarily cure it; if valid, his non-appearance after notification by publication cannot impair it. Distinction has been made, however,[2] but it has not been generally drawn in all the States.

The description of personal property as belonging to the defendant has been held necessary,[3] yet the taking of the property from the possession of the defendant, its preservation in the custody of the sheriff, and the presumption that that officer has done his duty and that his answer is responsive to the command that he seize property of the defendant, should be deemed sufficient, and has been so considered.[4]

[1] See Chapter on Jurisdiction.

[2] Stoddart *v.* McMahon, 35 Tex. 267; Menley *v.* Zeigler, 23 Id. 88.

[3] Pond *v.* Baker, 55 Vt. 400, in which both real and personal property were attached; Clay *v.* Neilson, 5 Randolph, (Va.) 596; Mason *v.* Anderson, 3 Monroe, 293; Anderson *v.* Scott, 2 Mo. 15; Maulsby *v.* Farr, 3 Mo. 438; Ridgeway *v.* Farr, Id. 440; Repine *v.* McPherson, 2 Kan. 340.

[4] Drake *v.* Mooney, 31 Vt. 619; Porter *v.* Pico, 55 Cal. 165; Johnson *v.* Moss, 20 Wend. 145; Lucas *v.* Godwin, 6 Ala. 831; Bickerstaff *v.* Patterson, 8 Porter, 245; King *v.* Bucks, 11 Ala. 217.

If property, real or personal, is attached as the defendant's, and is really his, and is described with certainty, it seems of little importance what the sheriff says about the title, unless he should aver the title to be in some person other than the defendant. Should he make return that he has seized some third person's land, the attachment would be invalid since it depends so much upon the return; the presumption that the officer had done his duty would be removed, and the notice to the tenant in possession would not alone constitute a valid levy.

If the defendant, in the absence of any statement by the sheriff as to whom the attached property belongs, should appear and claim it, he would be estopped from afterwards attacking the attachment on the ground that the property was not his, unless his title has accrued since the levy. The question always is, whether the property belonged to the defendant at the precise time when it was attached. If he sold and transferred it before, or if he bought it since, the attachment is invalid. Nearly all the difficulties, with respect to the attachment of land as that of the defendant, depend for solution upon principles applicable to titles, which the opinion and statement of the sheriff does not at all affect. However, if property is attached as the defendant's when it was not and is not his, he has no interest to attack the attachment.

The law is well settled as to what other description of the attached property is necessary. It must be such as to identify it. Seeming conflicts of decisions on this subject will be found not really such. The differences turn upon details—whether they amount to certainty of identification in particular cases. In this there is nothing remarkable, since the circumstances differ in every case, and courts are always likely to vary with each other in their views of evidence on minor points, The principle may be fairly said to be uniformly recognized that the return must show to a certainty what has been attached, and describe it so that it cannot be mistaken for something else. A ship is sufficiently identified if described as the ship *Orion*, of 700 tons burden, together with her tackle, apparel and furn-

iture, the property of the defendant herein; the steamboat *Natchez, etc.*, (similar additions following;) but should a nameless and unknown watercraft be attached, such as a flat-boat, a more particular characterization would become necessary, such as the length and width, or some other matter essential to the identity of the property. The best description of land is by metes and bounds but it is not indispensable. If the defendant owns but one farm in a county, and the return is that his farm in that county is attached, it would ordinarily be sufficient in an attachment proceeding,[1] since only the defendant can be concluded by the judgment, though it would be insufficient were the proceeding one to conclude the world, like an action to fix the *status* of a thing forfeited. So, if the attachment defendant owns but one house and lot in a city, it would be better to describe it, for instance as the three story brick house, numbered three hundred and sixty, on Thalia Street, in the square numbered forty on the city plan, etc., together with his lot on which the house stands, giving the names of the streets which bound the square; but if it is the only house of the defendant, situated in the city, it might be designated as his house, together with his lot on which it stands, in the city. The sheriff is not absolutely bound to resort to the records, and give a synopsis of the recordation, but that would enable him to give a better description.[2]

A stock of goods is often the subject of seizure. If the whole stock in a store is attached, described as the defendant's entire stock of dry goods, or of hardware, or of groceries, as the case may be; as being in a certain building, (giving the number of the building and the name of the street, city, etc.,) the description could not be mistaken; and as the sheriff must take the key and keep control personally or through a deputy or some other appointed custodian, there could hardly be raised any question as to the identity of the property seized. He is

[1] Moore *v.* Kidder, 55 N. H. 488; Howard *v.* Daniels, 2 N. H. 137; Crosby *v.* Allyn, 5 Greenl. 453.

[2] Such certain though general description would be sufficient to point to the records for a perfect description. Bryant *v.* Osgood, 52 N. H 188.

not obliged, in every case, to take an invoice of the goods and attach it to his return.

Should he attach only some portion of the goods, certainty would require that he make an inventory and attach it to his report. Should he attach a single article, he should designate it with precision. Suppose a horse is attached: if returned simply as "a horse" belonging to the defendant, the indefiniteness would not render the attachment viscious, since the officer would have the attached horse in custody, but it would be better to say a bay horse, white, black—as the case might be; and, if the animal is a noted one—a celebrated trotter, for instance, the name would conduce to a better description. Courts will judge, in each particular case, whether the property seized is properly identified, or whether it is so loosely described as to be easily confounded with other property.[1]

An attachment may be dissolved because of uncertainty of description in the return, if the defect is not cured in any legal way, because the validity of the lien depends upon positiveness as to that upon which it rests; and as a tenant in possession of real estate would have no proper notice by an inadequate description endorsed upon the writ served on him, there would be no valid attachment.[2]

Since the sheriff's duty is to attach property enough to cover the claim sued upon, when he is not restrained to less by

[1] Porter *v.* Pico, 55 Cal. 165; Fenglin *v.* Cairo & St. Louis R. R. Co. 6 Mo. App. 580; Pierce *v.* Strickland, 2 Story, 292; Buckhardt *v.* McClellan, 1 Abb. App. Dec. 263; Oysted *v.* Shed, 12 Mass. 513; Taylor *v.* Mixter, 11 Pick. 341; Welsh *v.* Joy, 13 Id. 477; Baxter *v.* Rice, 21 Id. 197; Moore *v.* Kidder, 55 N. H. 488; Bruce *v.* Pettengill, 12 N. H. 341; Ela *v.* Shepard, 32 Id. 277; Bryant *v.* Osgood, 52 Id. 182; Crosby *v.* Allyn, 5 Me. 453; Haynes *v.* Small, 22 Me. 14; Carleton *v.* Ryerson, 59 Me. 438; Fullam *v.* Stearns, 30 Vt. 443; Toulmin *v.* Lesesne, 2 Ala. 359; Gary *v.* McCown, 6 Id. 370; Pearce *v.* Baldridge, 7 Ark. 413; Porter *v.* Byrne, 10 Ind. 146; Messner *v.* Lewis, 20 Tex. 221; Menley *v.* Zeigler, 23 Tex. 88; Hancock *v.* Henderson, 45 Tex. 479; Rogers *v.* Bonner, 55 Barb. 9; Perrin *v.* Leverett, 13 Mass. 128.

[2] Pond *v* Baker, 55 Vt. 403; Menley *v.* Zeigler, 23 Tex. 88; Porter *v.* Byrne, 10 Ind. 146; Hathaway *v.* Larrabee, 27 Me. 449; Lambard *v.* Pike, 33 Id. 141; Henry *v.* Mitchell, 32 Mo. 512; Fitzhugh *v.* Hellen, 3 Har. & J. 206. See Green *v.* Pyne, 1 Ala. 235.

instructions from the plaintiff, he should designate in his return the approximate value of whatever he has seized, which may be ascertained by appraisement, and which must be so ascertained under some statutes.[1] An appraiser's certificate put on the back of the writ, and made part of the return, is sufficient report of the value of goods attached.[2] A return showing enough property seized to satisfy the sum claimed by the plaintiff in his prayer, will show substantial obedience by the officer to the mandate, though the several counts of the plaintiff's declaration may amount to a statement of greater indebtedness on the part of the defendant than that for which the plaintiff prayed.[3]

Sec. 2. Requisites of the Return.

If a corporation is served, the officer should show upon what representative of the body the service was made. There should not be a vague statement that the writ was served upon an agent of the corporation; for, though his name may be coupled with his designation as agent, it may be that he is not such an agent as will make the service upon him a legal one on his principal. Every agent of a corporation cannot stand for the body when it is sueing or being sued. The president is usually the proper representative of a corporation upon whom process binding it may be served, but an inferior officer may be duly authorized to represent a corporation in this respect. How are we to know, when an officer names a man on whom process has been served, and adds that he is agent of the corporation, (defendant or garnishee in the suit, as the case may be,) that the corporation itself has been reached?[4]

[1] Neglect to insert the value may be cured by legal presumption where the statute does not imperatively require a statement of the amount. Childs *v.* Ham, 23 Me. 74; Barney *v.* Weeks, 4 Vt. 146.

[2] Kennedy *v.* Pike, 43 Me. 423.

[3] When the amounts claimed in the counts in the writ exceed the *ad damnum*, the statement of the latter as "the sum sued for," was held to be a compliance with the law in an officer's return to the registry of deeds of an attachment of real estate. Lincoln *v.* Strickland, 51 Me. 321.

[4] Held in the Lake Shore, etc. Ry. Co. *v.* Hunt, 39 Mich. 469, that, under § 6463 Comp. Laws, (Howell's Stat. § 8055,) the "general or special agent" of a corporation on whom a summons in garnishment

Where landed property, such as a house and lot, is attached, it is important that notice be given to the tenant in possession, or a copy of the writ left with him, or some act showing the transfer of legal possession from the defendant to the officer, if the law of the State requires such methods of seizure, or any one of them, or like methods; and whatever is required should be returned as accomplished.[1] It is not sufficient, in such case, to say that the writ has been served on a garnishee, naming the person in possession.[2]

When the officer has served several attachments and made levies, in each, on the same property, he should report in each case that he has seized that property under the writ issued therein,[3] giving the exact dates of each seizure. Where the law requires witnesses to the levy, their names must appear in the return,[4] for where there are competing attachments, and where other evidence than the marshal's or sheriff's report is allowable, the insertion of the witnesses' names is a means of avoiding much possible contention. In such case, where fractions of a day are noticed, the exact date of the levy, even to the minute, becomes of vital importance. If two attachments are in competition, and the return of one shows execution at noon while that of the other specifies the same day but no hour, it has been held that the first will be marshalled as the higher in rank.[5]

A return being accurate as to the time of the levy but indefinite as to that of the summons, the presumption has been made that the summons was served on the same day that the property was attached.[6]

It has been held that an attachment should not be dissolved

may be served, is one having controlling authority in respect to some department of corporate business, and return of service on "John W. Drew, agent of the within named defendant," was insufficient.

[1] Page *v.* Generes, 6 La. Ann. 551.

[2] Bryan *v.* Trout, 90 Pa. St. 492; Lake Shore, &c., R. R. Co. *v.* Hunt, 39 Mich. 469; Hayes *v.* Gillispie, 11 Casey, 155; Anderson *v.* Scott, 2 Mo. 15; Sterrett *v.* Howarth, 76 Pa. St. 438.

[3] Violet *v.* Tyler, 2 Cr. C. C. 200.

[4] Cabeen *v.* Douglass, 1 Mo. 336; see Morgan *v.* Johnson, 15 Tex. 568.

[5] Fairfield *v.* Paine, 23 Me. 498; Brainerd *v.* Bushnell, 11 Ct. 16.

[6] Talcott *v.* Rozenberg, 8 Abb. Pr. N. S. 287. In this case, it seems that

because the sheriff endorsed on the summons the date of its issue as that of its service, when, in fact, the service was made on the day following.[1]

The return may be made at any hour of the return day.[2] It may be made on any day while the writ is alive, but not before its creation or after it has expired. If the date of the writ is later than that of the officer's return, the latter is premature and therefore void.[3] If the return day has expired, no return can be legally made.[4]

The return should be lodged wherever the law of any State requires it to be;—with the clerk of the court, or the register, or the prothonotary, etc., but the returning officer is not obliged to present it personally to the receiving officer.[5]

The writ is usually returnable to the officer who issued it, but the necessary matter is that it be returned to the court; and even where a statute directs that the return be made to the officer issuing the writ, failure to follow such direction is not fatal to the attachment, nor does it impair the validity of the return. Such a law is merely directory.[6]

Sometimes returns are made by officers who did not make the levies,[7] though the practice is neither general nor commendable.

When one is appointed to serve a writ, and he is not a deputy sheriff or in any official capacity by which he would be competent to render such duty, he must show his authority in the return—for the validity of his act depends upon his right to

the return did not show that the service was made within the time required by law. Ordinarily the return ought to be sufficient to show that fact.

[1] Cureton *v.* Dargan, 12 S. C. 122.

[2] People *v.* Wheeler, 7 Paige, (N. Y.) 433. The exception is made in this case, however, that if ordered by the court to return the writ immediately, the officer must do so. Held in Wisconsin that under the practice there, a writ of attachment need not be returned at any particular time, but must be sued out after the principal suit as supplemental to it. Chase *v.* Hill, 13 Wis. 222. See Reed *v.* Perkins, 14 Ala. 231.

[3] Berry *v.* Spear, 13 Me. 187.

[4] Russ *v.* Butterfield, 6 Cush. 242; Williams *v.* Babbit, 14 Gray, 141.

[5] Kendall *v.* Irvine, 42 Me. 339; Bessey *v.* Vose, 73 Id. 217; Ritter *v.* Scannell, 11 Cal. 238.

[6] Rodgers *v.* Bonner, 55 Barb. 9.

[7] McMeekin *v.* Johnson, 2 Dana, (Ky.) 459. Held void: Onley *v.* Shepherd, 8 Blackf. 146.

act.[1] Even if he is an officer, ordinarily empowered to serve attachment, yet his right to serve a particular attachment may be affected by interest.[2]

The signature of the officer to his return should always be made, for reasons apparent; but an inadvertent omission of it would not necessarily invalidate the return. Of course, an unsigned return which he never meant to file, would be of no avail should the fact of its surreptitious or accidental filing be made to appear; but the attachment may have been perfect, though the written evidence of it should want the signature of the officer.[3]

The deputy may sign, if he served the writ, but the sheriff is presumed to act through him. If the sheriff has seen the return and allowed it to be filed, he cannot recover of his deputy if it prove to be false.[4] There may be circumstances under which he could; for the deputy might artfully and purposely deceive his principal.

The officer should show, in case no service has been made, why it has not been made; as that the defendant could not be found. He should show why it was not left at the residence of the defendant or at the place of his last residence; as, that he has no residence in the county or State. It is important when the character of the attachment suit is to be determined. Though the debtor be not personally served, there may be a service legally equivalent to a personal one, such as leaving the summons and writ at his domicile with a person of proper age.[5]

Sec. 3. Amendments.

The sheriff or marshal has full control over his return before

[1] Currens *v.* Ratcliffe, 9 Iowa, 309.

[2] Waterhouse *v.* Smith, 22 Me. 337: Held, that if the officer is a party, his return is only *prima facie* evidence.

[3] Lea *v.* Maxwell, 1 Head, (Tenn.) 365; Clymore *v.* Williams, 77 Ill. 618.

[4] Wasson *v.* Linster, 83 N. C. 575.

[5] In Michigan, it is a statute requirement that if the defendant cannot be found in the county, a copy of the writ must be left at his last place of residence or the return must show that he had no such last place of residence. Adams *v.* Abram, 38 Mich. 302; Id. 304; Smith *v.* Curtiss, 38 Mich. 393; Nicolls *v.* Lawrence, 30 Mich. 396; Town *v.* Tabor, 34 Mich. 265.

he has had it filed; and, after the filing, he may be granted leave to amend it in some particulars, such as adding that the thing attached belongs to the defendant, or one or more of several defendants;[1] specifying particular articles;[2] inserting that a copy of the attachment was posted as required;[3] substituting the proper name of the court for the wrong designation,[4] etc., but he cannot be permitted to make out evidence for himself, when sued for official wrong-doing, by amending his return after it has been duly made.[5] Amendments affecting jurisdiction cannot be made without proceeding contradictorily with the party to be affected by the change.[6] To allow a total omission of a return to be supplied *nunc pro tunc* is irregular, and would be generally held illegal, though it is not without a precedent.[7]

While slight errors of inadvertence may generally be amended, the neglect to state the time of the attachment, though it also may be unintentional, cannot always be remedied by amendment.[8] The whole question between creditors competing for priority turns usually upon the point of time when one of the attachments was first executed; and, to give the officer the right to amend after an issue made between the competitors would be equivalent to giving him the decision of the issue.

It would seem to be a correct, general proposition that an officer cannot amend his return after judgment.[9] Even during the progress of the trial, if he wishes to amend an erroneous return, there must be a proper proceeding and showing before he can exercise his right to do so.[10]

[1] Mason *v.* Anderson, 3 T. B. Monroe, 293; Anderson *v.* Scott, 2 Mo. 15; Bank of North West *v.* Taylor, 16 Wis. 609.

[2] Baxter *v.* Rice, 21 Pick. 197.

[3] Wilson *v.* Ray, T. U. P. Charlt. (Ga.) 109.

[4] Covington *v.* Cothran, 35 Ga. 156; Norvell *v.* Porter, 62 Mo. 309.

[5] Haynes *v.* Knowles, 36 Mich. 407.

[6] Id. Montgomery *v.* Merrill, 36 Mich. 97.

[7] Bancroft *v.* Sinclair, 12 Rich. 617.

[8] Taylor *v.* Emery, 16 N. H. 359.

[9] But in Odom *v.* Shackelford, 44 Ala. 331, it was held that the sheriff's return of an attachment sued out by the landlord against the crop of his tenant may be amended after judgment so as to show that the crop levied on had been grown on the rented land.

[10] Sanford *v.* Pond, 37 Ct. 588.

Slight and unimportant omissions which may be readily supplied by the sense generally conveyed, will not vitiate a return. Nor will the insertion of superfluous verbiage.[1]

A return may have erroneous words corrected, and omissions supplied, upon reasonable presumption. In the absence of proof to the contrary, the officer will be presumed to have done his duty, in matters for the return of which there is no prescribed form.[2] When goods are reported as attached, with an omission of the value, the presumption that they are sufficient to meet the demand has been made.[3]

Where details are not statutorily exacted, an officer may return that he has attached certain, described property at a certain time, in conformity to the writ; and such statement is deemed equivalent to a return of all the facts done which are required to constitute a valid attachment; and, in the absence of fraud, it is sufficient, and conclusive of the fact of the attachment;[4] but whatever details a statute exacts should be stated and not left to be presumed. The general return "duly made, etc.," is presumably correct, but it may be controverted.[5] Reasonable intendments are made in favor of an officer's return.[6]

The presumption that an attaching officer has done his duty, will not avail to overcome the omission of essential facts; nor can unintelligible statements be supplied by conjecture.[7] There is another presumption that may be invoked against an officer

[1] Land returned as "supposed" to belong to the defendant was deemed sufficiently designated as to ownership when the fact was that he owned it. Bannister *v.* Higginson, 14 Me 73. Stating that the attachment was made "at the risk of the plaintiff," is mere surplusage, and of no legal effect in protecting the officer. Lovejoy *v.* Hutchins, 23 Me. 272.

[2] Miller *v.* Fay, 40 Wis. 633; Lewis *v.* Quinker, 2 Met. (Ky.) 284: Omission to state that a copy of the attachment was posted in a "conspicuous place" on a lot seized, (there being no tenant upon whom to serve the writ,) was held cured by such presumption, when the officer had returned that he had posted it on the premises. In Redus *v.* Woffard, 12 Miss. (4 S. & M.) 579, "executed" was presumed to mean regularly executed in legal form.

[3] Childs *v.* Ham, 23 Me. 74.

[4] Lathrop *v.* Blake, 23 N. H. (3 Fost.) 46; Prather *v.* Chase, 3 Brews. (Pa) 206.

[5] Porter *v.* Pico, 55 Cal. 165; Anderson *v.* Graff, 41 Md. 601; Crisman *v.* Swisher, 4 Dutch. 149; Baldwin *v.* Conger, 9 Sm. & M. 516.

[6] Drake *v.* Mooney, 31 Vt. 619.

[7] Hathaway *v.* Larrabee, 27 Me. 449.

who has made an inadequate statement of the facts attending the levy; the presumption that he has stated all the facts. It is his duty to indorse upon the writ what he did, in serving it; and he will be presumed to have done so.[1] Important facts thus omitted cannot be assumed to have occurred.

Errors or omissions in a return, which the affidavit or other part of the record fully cures, (when not violative of some statute requirement,) ought not to militate against the plaintiff so far as to defeat the attachment.[2]

Even though the officer may not have actually seized the goods of a third person by any manipulation or disturbance of them, putting a keeper over them, or exercising any act of possession whatever in regard to them, yet if he makes a return upon the writ that he has seized them, the real owner may be injured in his credit, put to trouble and expense by the wrongful return, or otherwise injured, so as to have a right of action against the officer; he may have such right though there has been no tortuous taking.[3]

So, the attaching creditor may be injured by the action or non-action of the officer; and, in a suit by him for repair of the wrong, the return in the attachment suit is conclusive upon the sheriff and his representatives.[4] If, however, the return should contain the statement that the attachment was made under the instructions and "at the risk of the plaintiff," that would not be conclusive against the latter, because such assertion is not required by law and therefore forms no proper part of the official paper, the officer cannot thus make incontrovertible

[1] Sharp *v.* Baird, 43 Cal. 577, in which the levy was held invalid, since the writ did not state an essential fact. Instead of presuming that the sheriff had done his duty, the court assumed that no copy of the attachment had been posted as required because not set forth in the return; and, under the circumstances of that case, it could hardly have held otherwise.

[2] Bannister *v.* Higginson, 15 Me. 73; Miller *v.* Fay, 40 Wis. 633; Lovelady *v.* Harkins, 6 Smedes & M. 412; Clanton *v.* Laird, 12 Id. 568.

[3] Gibbs *v.* Chase, 10 Mass. 128; Marston *v.* Baldwin, 17 Mass. 606; Morse *v.* Hurd, 17 N. H. 246; Paxton *v.* Steckel, 2 Pa. St. 93; Miller *v.* Baker, 1 Met. 27. See Galloway *v.* Bird, 4 Bing. 299; Meany *v.* Head, 1 Mason, 319; Pangburn *v.* Patridge, 7 Johns. 140.

[4] State *v.* Penner, 27 Minn. 269.

evidence for himself to be used in case of a suit against him; but the *fact* that the plaintiff instructed him and took the risk of the attachment, when properly proved at the right time, would shield the officer from a suit by the plaintiff; and enable him to recover of the plaintiff in case damages should be awarded in a suit by third persons against such officer.[1]

The general rule is that a sheriff's return, upon attachment and similar writs, cannot be contradicted by parol evidence. And ordinarily it cannot be thus extended or explained. If the return is false and injurious, the injured party has his remedy by action against the officer for a false return, but the court will receive the official report in the case in which it is made, as purporting absolute verity.[2] The officer has entire control over the return until it has been filed; the court cannot dictate to him what facts to report; and, after the filing neither the officer at his own volition, nor the court, by directing the officer, can make any change that would affect the vested right of any party. The officer himself must abide his action, though to his injury,[3] unless he have leave of court to amend.

The inviolability of the return is confined to itself as an official document. The facts which it states may be controverted as facts stated by one of the parties but not as constituting the

[1] Lovejoy *v.* Hutchins, 23 Me. 272; Lesher *v.* Getman, 30 Minn. 321; Nelson *v.* Cook, 17 Ill. 443; Gower *v.* Emery, 18 Me. 79; Sanders *v.* Hamilton, 3 Dana, (Ky.) 550; Humphreys *v.* Pratt, 2 Dow & Clark, 288.

[2] Kendall *v.* White, 1 Shep. 245; Haynes *v.* Small, 9 Id. 14; Baker *v.* McDuffie, 23 Wend. 289; Denny *v.* Willard, 11 Pick. 519; McBee *v.* The State, 1 Meigs, 122; Brown *v.* Davis, 9 N H. 76; Chadbourne *v.* Sumner, 16 *Id.* 129; Sawyer *v.* Curtis, 2 Ashmead, 127; French *v.* Stanley, 21 Me. 512, Mentz *v.* Hamman, 5 Whart. 150; Haynes *v.* Small, 22 Me. 14; Sample *v.* Coulson, 9 Watts & Serg. 62; Paxton *v.* Steckel, 2 Pa. St. 93; Clarke *v.* Gary, 11 Ala. 98; Rowell *v.* Klein, 44 Ind. 290; Splahn *v.* Gillespie, 48 Ind. 397.

[3] Haynes *v.* Small, 22 Me. 14; Sawyer *v.* Curtis, 2 Ashmead, 127. When the officer returned that he had left a copy of the attachment writ, etc., at the defendant's place of abode, the return was held to be open to contradiction. Buckingham *v.* Osborne, 44 Ct. 133. So also when he returned that he had made the required certificate to the registry of deeds. Dutton *v.* Simmons, 65 Me. 583. Sheriff may prove facts *dehors* their returns, when not inconsistent therewith: Pierce *v.* Strickland, 2 Story, 292; Evans *v.* Davis, 3 B. Mon. 344; Williams *v.* Cheesebrough, 4 Ct. 356; Denton *v.* Livingston, 9 Johns. 96.

return. For illustration: the sheriff may report that he has attached a farm as the property of the defendant, or that the farm which he has attached is the property of the defendant. This cannot be contradicted; that is the fact that he has so attached it cannot be. But an intervenor may interplead and allege that the property attached belongs to him and not to the defendant. Of course the return cannot possibly preclude parties from asserting facts just the opposite of what it may have stated, yet this would not be what is meant by contradicting the return. A purchaser at a sale is not protected by the sheriff's return that the attached property belonged to the defendant, if the records show that it did not, and it therefore was not the *res*.[1]

Sec. 4. Garnishment Return.

The garnishee has no right to waive service.[2] He has no right to thus aid the plaintiff to the prejudice of the defendant, his own creditor or principal as the case may be. His interest should deter him from the voluntary acceptance of service, since he might afterwards be precluded from setting up the payment of the debt under judicial order in the attachment proceeding, should his own creditor afterwards sue him for the same debt. However, should he waive service, and voluntarily appear in court and answer, the garnishment would hold good against himself.[3] It would also hold good, in case he acknowledged indebtedness to the defendant, or possession of his property, for all the purposes of the garnishment so far as the

[1] Merritt *v.* Miller, 13 Vt. 416; Fullam *v.* Stearns, 30 Id. 444; Robertson *v.* Kinkhead, 26 Wis. 560; Repine *v.* McPherson, 2 Kan. 340; Pelton *v.* Platner, 13 Ohio, 209; Tiffany *v.* Glover, 3 G. Greene, 387; Bannister *v.* Higginson, 15 Me. 73; Lincoln *v.* Strickland, 51 Id 321. Bacon *v.* Leonard, 4 Pick 277; Anderson *v.* Scott, 2 Mo 15, Mason *v.* Anderson, 3 Mon. 294; Clay *v.* Neilson, 5 Randolph, 596.

[2] Phelps *v* Boughton, 27 La. Ann. 592; Epstein *v.* Salorgne, 6 Mo. App. 352; Hebel *v.* Amazon Ins Co 33 Mich 400 But it was held that he may, when no rights of opposing creditors are involved: Freeman *v.* Miller, 51 Tex 443.

[3] National Bank of Commerce *v.* Titsworth, 73 Ill. 591.

plaintiff is concerned, and so far as the defendant should be adjudged indebted.

Mere irregularities of service are waived by the answer,[1] and such waiver would not subsequently prejudice the garnishee in any action by the defendant against him, since he is not bound to except or demur to such service; he is only bound to do what good faith towards his immediate creditor requires.

In some matters the law treats a day as a whole and disregards its subdivision into hours. Under the rule that the law makes no fractions of a day, a voter who is twenty-one years old at sunset on election day may vote as soon as the polls are open on the morning of that day. But where there is reason for noting subdivisions the law notes them. There is reason that the garnishee should be first answerable to the first interrogator, though addressed but a minute before the second plies his questions.[2] And the garnishee will be adjudged to deliver the goods which he holds, or pay the debt which he acknowledges, not to the attaching creditor who first obtains judgment, but to the one who first serves him with summons and interrogatories who may afterwards obtain judgment.[3]

The importance of stating the hour and minute of service is seen when creditors are competing for rank. A sheriff may amend his return, provided no acquired rights would be thereby affected. Parol evidence has been admitted to show the exact hour or minute of service, when the return merely stated the day This is not contradictory of the return. As a general rule, a sheriff's or marshal's return cannot thus be eked out.

It is possible that the garnishee may fail to get a summons left for him at his residence, or fail to understand one read to him by way of service, or may otherwise receive summons without really knowing it. Under such circumstances, should the sheriff make return that he had summoned the garnishee, and thereafter the case go on to judgment, it seems that the

[1] Moody *v.* Alter, 12 Heisk. 142.

[2] In Pennsylvania, the law makes no fractions of a day, with respect to garnishments. Baldwin's Appeal, 86 Pa. St. 483.

[3] Tufts *v.* Carradine, 3 La. 430. *Contra:* Yelverton *v.* Burton, 26 Pa. St. 351.

garnishee who has ignorantly and innocently paid to the defendant meanwhile, will still be bound to the plaintiff.[1]

The return should show whether the summons and interrogatories have been served on the person to whom they were directed. If the garnishee is a corporation, the return should show upon what officer or agent the service was made.[2] This is important, if the validity of the service is brought into question.

What property or credit is attached by the service cannot be shown or described in the return, except in States where the garnishee gives a certificate to the sheriff disclosing what attachable property he holds, or what debts he owes to the defendant. Whatever is definitely attached should be returned.[3]

The time of the service should be specified; even particularity to the minute may be important where there are competing creditors, each seeking priority. The reason is, that the service fixes the date of the attachment if it should afterwards appear, by the garnishee's answer or otherwise, that he then held property or credits belonging to the defendant.[4]

While a judgment against a garnishee would be void, if notice neither by service nor publication had been given to the attachment-defendant,[5] (unless waived, or rendered unnecessary by appearance,)[6] yet the process of garnishment may be served upon the garnishee *before* the notice is made upon such defendant, when the latter can only be reached by publication, for the garnishment is really a proceeding *in rem* against the property in the hands of the garnishee.[7] The logical order in

[1] Hite *v.* Fisher, 76 Ind. 231; Cleneay *v.* The Junction R. R. Co. 26 Ind. 375; Ryan *v.* Burkham, 42 Ind. 507; Rowell *v.* Klein, 44 Ind. 290; Splahn *v.* Gillespie, 48 Ind. 397.

[2] Northern Central R. R. *v.* Rider, 45 Md. 24.

[3] Fenglin *v.* Cairo & St. Louis R. R. Co. 6 Mo. App. 580. See Norvell *v.* Porter, 62 Mo. 309.

[4] In Missouri, where it is held that the service of summons has not the effect of attaching a credit in the garnishee's hands, (Mosher *v.* Banking House, 6 Mo. App. 599,) this reason would be inapplicable.

[5] Hinds *v.* Miller, 52 Miss. 845.

[6] Everdell *v.* Sheboygan &c. R. R. Co. 41 Wis. 395.

[7] It was held in Iowa that in a proceeding by garnishment, process may be served upon the garnishee without notice to the principal defendant. Phillips *v.* Germon, 43 Iowa, 101. No judgment could legally follow without notice to the principal defendant, actual or constructive.

an action directly against property is to seize it first and notify interested parties afterwards.

Sec. 5. Publication Notice.

When the sheriff makes return that the debtor to whom summons was addressed cannot be found, the court issues an order for constructive notice by publication.[1] The order, the compliance with it, and the return must all conform to the governing statute. Where the statute designates no form for the order but merely prescribes that an order of publication be made, the court will fashion its own form. The substantial thing for the order to contain is that such notice be given to the defendant named in the plaintiff's petition as will inform him that the suit is pending against him, and that property of his is seized or about to be, so that he may have knowledge of it and his opportunity to defend and to have his day in court.

Such order may be published as the notice, if it is full enough to convey notice, and is addressed to the defendant by the sheriff. The form of the notice, written out by the sheriff, must be in compliance with the judge's order, and with the statute. Where no special form of words is prescribed by statute, it will be sufficient if the defendant is addressed through the notice, and told of the suit pending against him, of the attachment of his property or the order for its attachment and of the time within which he must appear, the court, the name of the plaintiff, the demand, the grounds, *etc.*

It cannot be laid down, as a general rule, that the notice must describe the property attached, as in case of proceedings against a thing, with general notice, in vindication of a *jus in re*, when only the thing is impleaded, and when the notice is addressed to all persons alike; for, in attachment proceedings,

[1] The order to make publication is granted on the application of the plaintiff. If the original affidavit contains all that is necessary, no further oath is required. Bray *v.* Marshall, 75 Mo. 327. Affidavit may be made by an attorney: Weaver *v.* Roberts, 84 N. C. 493. It must show that defendant cannot be found in the State: Faulk *v.* Smith, Id. 501.

which are personal in form, the notice is given to the person or persons named in the petition as the defendant, that he may make appearance, and have the suit go on mainly as a personal one, and thus render particular description unnecessary. But sometimes there may be the reason for absence of description, that the notice is published when summons has failed to be served, and, when nothing already may have been attached. All that the absent debtor can be told, in such case, is that property of his is to be attached.[1] When it is already attached, (which is usually required before publication,) its brief description in the advertisement would not only be proper but highly commendable, even where the statute does not require it.[2]

When the law merely requires notice of the suit to be given to the defendant, without any further statutory direction, it is still necessary that the notice should show all that is requisite to enable the defendant to know who is sueing and on what demand; to know that his property is attached or to be attached, and to know within what time he is required to make appearance.

The publication ought to be as full as the unserved writ and summons, at least; it ought to convey to the defendant as much knowledge of what is being done against him and his property as he would have if within the jurisdiction and there served with the writ and summons. Wherever, in whatever part of the world, the publication may strike his eye, he ought to be made as fully acquainted with the suit as he would be if within hearing of a proclamation calling him to court.[3] And the publication must describe the property attached when the statute expressly or impliedly requires it.[4]

Summons is a command: publication notice is an invitation;

[1] Harris *v.* Grodner, 42 Mo. 159.

[2] Not required as to personal property, in Kansas: Beckwith *v.* Douglas, 25 Kan. 229; Race *v.* Maloney, 21 Kan. 31.

[3] Gilliland *v.* Cullem, 6 Lea, (Tenn.) 521. Publication is not fatally defective for failing to state specifically that an order will be entered for the sale of property attached. Rapp *v.* Kyle, 26 Kan. 89.

[4] Wescott *v.* Archer, 12 Neb. 345: "When attachment is levied on the land of a non-resident and summons is not made on him, the court possesses no power to render judgment against him and to order the sale of his property to satisfy the same, un-

summons brings the defendant under the jurisdiction of the court: publication offers him the opportunity of voluntarily coming under it; summons is itself a writ: publication is a printed proclamation; summons gives jurisdiction over the person and completes it over attached property: publication completes jurisdiction over the attached property but gives none over the person of the debtor, as will be shown in the chapter on jurisdiction.

Notice by publication is *not constructive service*. Notwithstanding loose expressions in statutes concerning "service of process by publication," and unguarded statements of courts and commentators, it is evident that no one can be served so as to render him personally amenable to the court and liable to a personal judgment by a mere invitation to appear, claim and defend, published in the newspapers. Constructive service—such as leaving the summons at the domicile of the defendant with an inmate of competent age to receive it,—is as good in law as actual, personal service, and the summoned party can disregard it only at his peril. Such constructive service upon a witness or a juror would be sufficient basis for a subsequent attachment of his body, should he treat it with contumacy and contempt. Such a constructive service would authorize a personal judgment against a defendant who should commit default, whether any property was attached or not. No such results follow publication notice. No such results can follow it, though the statute should use the term "constructive service," meaning merely notice by publication when effort to make any service at all, actual or constructive, has failed. To treat such *notice* as *service* is contrary to the common law.[1]

Those who think service may be effected by publication find difficulty when the defendant is beyond the territorial jurisdiction; but no obstacle is encountered for that reason when the publication is merely to notify the owner of attached property

less publication has been made as required by law, and the notice should contain a description of the property attached." Anderson *v.* Coburn, 27 Wis. 558, is approved, and Paine *v.* Mooreland, 15 Ohio, 435, is sharply and justly criticised.

[1] Boyland *v.* Boyland, 18 Ill. 552; Hallett *v.* Righters, 13 How. Pr. 43; Brownfield *v.* Dyer, 7 Bush, 505.

that he may have an opportunity to appear voluntarily. No rule of the common law is violated, in letter or in spirit, by such information given to one beyond the territorial jurisdiction or secreted within it so as not to be personally found and served, or without domicile within it so as to be constructively served with summons.[1]

In the prevalent system of attachment now practiced in this country, the suit is not against any person when no person is served or is in court without service; it is *in rem*, and opportunity *must* be given to him whose interest is sought to be divested by the judgment, or the whole proceeding is a nullity. Cases seemingly to the contrary will be found;—those in which attachment was to compel appearance by distraint—not a suit to create a lien and mature it by judgment final and retroactive; or they will be found grounded in error superinduced by the common failure to distinguish between the two widely different theories of attachment.[2]

When the attachment suit, though nominally *in personam* is effectually *in rem*, and summons has been returned unserved, the publication of notice is required by the statutes establishing the present prevailing system of attachment; and the fact, that statutes require it, removes the presumption that there is notice by seizure. Notice must be given, since it is statutory. Silence in the statute on the subject would not authorize procedure without it;[3] it would not justify the presumption that seizure gave notice, because the extraordinary procedure by which a lien is created to secure an ordinary debt has no favor beyond what it derives from statutory conferment.

If an absent and non-resident debtor could be *constructively*

[1] Hahn *v.* Kelly, 24 Cal. 417.

[2] Beech *v.* Abbott, 6 Vt. 586 was a case concerning cattle that had been attached to compel the owner to appear and give bail conditioned that he would defend the suit. Williams *v.* Stewart, 3 Wis. 773 and Matter of Clark, 3 Denio, 167 do not sustain the doctrine that they are frequently cited to support. Paine *v.* Mooreland, 15 Ohio, 435, teaches that jurisdiction may be obtained without either service or notice, but it contains its refutation within itself.

[3] Hollingsworth *v.* Barbour, 4 Pet. 466.

served by publication, judgment could be rendered against him personally whether any thing was attached or not: but he cannot have judgment against him personally under such circumstances,[1] because publication is not constructive service.

The notice must not only be published as often as required, and in as many newspapers as are designated in the statute, and in the particular ones named in the order, if any are named, but, to comply with the spirit of the law, those who have the direction of the publication, (whether the judge or the sheriff,) should select the most widely read journals so that the defendant may have the best chance possible of seeing the advertisement and of really obtaining notice of the suit. Sometimes "papers having the greatest circulation" are designated in the statute; but, when they are not, the spirit of the law should oblige the judicial or executive officer, controlling the selection, to give the defendant the best opportunity possible for having his day in court.[2]

It will not do to avoid the publication and depend upon seizure as notice. It is true that it has often been said that seizure is notice; and, under the presumption that every owner knows when his property is in the adverse possession of another, the taking of it from an owner may be, in a certain sense, notice to him of the taking. The presumption has been repeatedly invoked, in libel causes against property and other proceedings *in rem* irrespective of personal owners, in which the property only is impleaded.[3]

[1] Pennoyer *v.* Neff, 95 U. S. 731, 734.

[2] Brewer *v.* Springfield, 97 Mass. 152; Sheldon *v.* Wright, 5 N. Y. 497; Soule *v.* Chase, 1 Rob. (N. Y.) 222; Beecher *v.* Stephens, 25 Minn. 146; Cincinnati *v.* Bickett, 26 Ohio St. 49; Kerr *v.* Hitt, 75 Ill. 51; Kellogg *v.* Carrico, 47 Mo. 157.

[3] The Mary, 9 Cr. 126, 144; Cross *v.* United States, 1 Gall. 28; Hollingsworth *v.* Barbour, 4 Pet. 475; Boswell's Lessee *v.* Otis, 9 How. 336; Nations *v.* Johnson, 24 How. 205; Lane *v.* Shears, 1 Wend. 433; Keating *v.* Spink, 3 Ohio St. 114; Thompson *v.* Steamboat Morton, 2 Ohio St. 30; Stewart *v.* Board, etc., 25 Miss. 479; New Orleans, etc. *v.* Hemphill, 35 Miss. 24; Scott *v.* Shearman, 2 Wm. Black. 977; Bradstreet *v.* The Neptune Ins. Co., 3 Sumner, 609; Schooner Bolina & Cargo, 1 Gall. 79; Story's Conflict of Laws, § 549; I Phillips on Ev. pp. 156, 198; II, p. 289 and 298, *note.* Greenleaf on Ev. § 38.

The attachment statutes, however, with great unanimity, (except in some, where foreign attachment is distinguished,) require that notices to alleged debtors be addressed to them through the newspapers, when summons has failed to reach them. Such requirement is not observed by the act of attaching. It is the written and printed and published address to the person concerned which the statute requires. And, since the entire remedy by attachment looks to statutory enactment for its right to be, no other constructive notice can be substituted for the publication. No number of decisions, showing that seizure, in a different class of cases, has been deemed notice, will justify its substitute for publication in an attachment case, where the law requires that the defendant be notified, and usually designates that such notice shall be by publication in one newspaper or more.

Seizure, considered as notice, is, at best, only presumptive notice, while the statutes, in providing for advertisement upon failure of summons, do not regard such presumption. Attachment laws do not regard seizure as any notice at all. They mean what they say when they ordain that something shall be published, and in a newspaper, and in a widely-read newspaper; and that that something shall let the charged debtor know that his property should be looked after.

Whether or not a publication is sufficient to complete jurisdiction over property, in any case, depends upon its substantial compliance with the statute and its giving the debtor such notice and warning that he may know that he is sued, his property exposed to a writ of attachment and his presence required in court on or before a specified time. If the substantials appear, the court will not disregard a publication or the return thereon because of unimportant omissions and slight variances, and superfluous additions. The rule respecting variances, etc., (except where the statute makes a difference,) is much the same in attachment suits as in others where publication is resorted to; and therefore others may be properly consulted in connection with attachment suits.[1]

[1] Goodman *v.* Niblack, 102 U. S. 556; Early *v.* Doe, 16 How. 611; Jackson *v.* Sprague, 1 Paine, 494; Ronkendorff *v.* Taylor's Lessee, 4

It is usual for statutes to fix some period within which publication must be made; and the person to be notified is entitled to the full time.[1] If the publication be postponed till the expiration of such period, the attachment falls.[2] And the same effect follows if the advertisement is not published the requisite number of times within the prescribed period.[3] In all cases, the order for publication, the publication itself, the proof it, and the record-showing of it should all conform substantially to the statute, not only with respect to the particulars above mentioned relative to time, but also when some prescribed interval must elapse between the date of the last insertion of the advertisement and the term of court.[4] Indeed, whenever publication is required by statute, in attachment suits or any

Pet. 361; Hunt *v.* Wickliffe, 2 Pet. 201; Worthington *v.* Hylyer, 4 Mass. 205; Bachelor *v.* Bachelor, 1 Mass. 256; Vose *v.* Handy, 2 Greenleaf, 322; Lawlin *v.* Clay, 4 Littell, (Ky.) 283; Pyle *v.* Craven, Id. 17; Rivard *v.* Gardner, 39 Ill. 125; Barnes *v.* The People, 18 Ill. 52; Vairin *v.* Edmonson, 10 Ill. 270; Forsyth *v.* Warren, 62 Ill. 68; Andrews *v.* Ohio R. R. Co. 14 Ind. 169; Morgan *v.* Woods, 33 Ind. 23; Harlow *v.* Becktle, 1 Blackford, (Ind.) 237; Dubbs *v.* Hemken, *et al.* 3 Rob. (La.) 129; Parsons *v.* Paine, 26 Ark. 124; Muskingum Valley Turnpike *v.* Ward, 13 Ohio, 120; Ford *v.* Wilson, Tappan, (O.) 235; Colston *v.* Berends, 1 Cro. Mees. & Ros. 833; Baily *v.* Myrick, 50 Me. 171; Swett *v.* Sprague, 55 Me. 190; Drew *v.* Dequindre, 2 Doug. (Mich.) 93; Swayze *v.* Doe, 21 Miss. 317; Bunce *v.* Reed, 16 Barb. 351; Sheldon *v.* Wright, 7 Barb. 45 and 5 N. Y. 517; Olcott *v.* Robinson, 20 Barb. 149 and 21 N. Y. 153; Soule *v.* Chase, 1 Abb. (N. Y.) Pr. N. S. 48; Chamberlain *v.* Dempsey, 13 Abb. 422; People *v.* Gray, 10 Abb. 469; Matter of Clark, 3 Denio, 167; Sloan *v.* Forse, 11 Mo. 126; Durrossett's Admr. *v.* Hale, 38 Id. 346; Harris *v.* Grodner, 42 Id. 159; Haywood *v.* Russell, 44 Mo. 252; Moore *v.* Stanley, 51 Id. 317; Freeman *v.* Thompson, 53 Id. 183.

[1] Lowenstine *v.* Gillispie, 6 Lea, 641; Swett *v.* Sprague, 55 Me. 190; Bogart *v.* Swezy, 26 Hun. 463; Hunt *v.* Wickliffe, 2 Pet. 201; Colwell *v.* Bank of Steubenville, 2 Ohio, 229; Haskell *v.* Bartlett, 34 Cal. 281; Freeman *v.* Thompson, 53 Mo. 183; Pyle *v.* Cravens, 4 Littell, (Ky.) 17; Swayze *v.* Doe, 13 Smedes & M. 317; Saffaracus *v.* Bennett, 6 How. (Miss.) 277.

[2] Mozarietta *v.* Saenz, 58 How. (N. Y.) Pr. 505; Blossom *v.* Estes, 59 Id. 381, and 84 N. Y. 614.

[3] Swett *v.* Sprague, 55 Me. 190; Dow *v.* Whitman, 36 Ala. 604; Lawlin *v.* Clay, 4 Littell, (Ky.) 283; Bachelor *v.* Bachelor, 1 Mass. 256.

[4] Andrews *v.* Ohio R. R. Co. 14 Ind. 169; Muskingum Valley Turnpike *v.* Ward, 13 Ohio, 120; Haywood *v.* Russell, 44 Mo. 252; Forsyth *v.* Warren, 62 Ill. 68; Vairin *v.* Edmonson, 10 Ill. 270.

other, the requisite as to time must be observed as well as all other requirements.[1]

There should always be record evidence of the fact of publishing the notice.[2] Such evidence must be precisely what the statute prescribes, where there is a provision specifying what form the evidence must take. The sheriff's return that notice was given in the prescribed way, for the prescribed time, in the journal designated by the law or by the order of court, and with all the particulars of information which the statute may require as essential to be notified to the defendant, may be sufficient in the practice of some States. Usually and more commendably, the papers containing the advertisement are filed in the cause, with the sheriff's return; and sometimes the publisher himself must make oath that the notice has appeared the requisite number of times within the given period, and at the proper intervals. It has been held that the fact of publishing may be found by the court, in the absence of anything upon the record to support the finding; but notice to an absentee, like any other jurisdictional matter, must appear of record in some form. Want of notice may be assigned as error. If the record shows that there was no notice when the statute required one, the judgment would be null.

[1] Morris *v.* Hogle, 37 Ill. 150; Schnell *v.* Chicago, 38 Ill. 382; Pomeroy *v.* Betts, 31 Mo. 419; Bobb *v.* Woodward, 42 Mo. 482; Likens *v.* McCormick, 39 Wis. 313; Sexton *v.* Rhames, 13 Wis. 99; Scorpion S. M. Co. *v.* Marsano, 10 Nev. 370; Grewell *v.* Henderson, 5 Cal. 465; People *v.* Huber, 20 Cal. 81; Lawrence *v.* State, 30 Ark. 719; Cook *v.* Farren, 34 Barb. 95; Lovejoy *v.* Lunt, 48 Me. 377; Zacharie *v.* Bowers, 3 Sm. & M. 641; Mitchell *v.* Woodson, 37 Miss. 567; Magoffin *v.* Mandeville, 28 Miss. 354; King *v.* Harrington, 14 Mich. 532; Crabb *v.* Atwood, 10 Ind. 331; Hill *v.* Foison, 27 Tex. 428; Colman *v.* Anderson, 10 Mass. 105; Bussey *v.* Leavitt, 12 Me. 378; Gary *v.* May, 16 Ohio, 66.

[2] Johnson *v.* Layton, 5 Harrington, (Del.) 252; Brinsfield *v.* Austin, 39 Ala. 227; Dow *v.* Whitman, 36 Ala. 604; Foyles *v.* Kelso, 1 Blackf. (Ind.) 215; Ex parte R. R. Co. 103 U. S. 794; Vairin *v.* Edmonson, 10 Ill. 270; Haywood *v.* McCrory, 33 Ill. 459; Haywood *v.* Collins, 60 Ill. 328; Johnson *v.* Hanna, 66 Ala. 127; Saffaraus *v.* Terry, 20 Miss. 690; Bates *v.* Crow, 57 Miss. 676; Clark *v.* Bratt, 71 Mo. 473; Millar *v.* Babcock, 29 Mich. 526; Carleton *v.* Washington Ins. Co. 35 N. H. 162; Freeman *v.* Thompson, 53 Mo. 183.

It has been held that when the judgment recites that publication has been made according to law, there is sufficient record evidence of publication.[1]

The failure of the record to show the fact of publication notice in compliance with law is so serious that when the omission is assigned as error, judgment in favor of the attaching creditor may be reversed on that ground. This is the rule in attachment proceedings as well as in other classes of cases where publication is required,[2] whether held jurisdictional or not.

When the defendant makes no appearance so as to cure want of summons or notice, the record must show one or the other. No one has ever conceived that summons need not appear of record, in a suit personal in form, where it is relied upon to show jurisdiction over a non-appearing defendant. Every reason against omitting the summons from the record under such circumstances applies against the omission of publication notice when it is relied upon, after failure of summons, to show jurisdiction completed over the attached property. Since publication is, by statute, made the substitute for an abortive sum-

[1] In Tennessee: Hopper *v.* Fisher, 2 Head, 253; Cornelius *v.* Davis, Id. 97; Birdsong *v.* Birdsong, Id. 289; Davis *v.* Jones, 3 Id. 603; Kilcrease *v.* Blythe, 6 Humph. 378; Gunn *v.* Mason, 2 Sneed, 637. But the necessity of publication, and its appearance of record, to the jurisdiction of the court, is fully and strongly held in the much later case of Walker *v.* Cottrell, 6 Bax. 257. Also, Ingle *v.* McCurry, 1 Heis. 26. The Code of Tennessee, § § 3522, 3523, 3524, makes publication a jurisdictional requisite.

[2] Haywood *v.* Collins, 60 Ill. 328; Haywood *v.* McCrory, 33 Ill. 459; Foyles *v.* Kelso, 1 Blackford, 215; Babbitt *v.* Doe, 4 Ind. 355; Guy *v.* Pierson, 21 Ind. 18; Doe *v.* Anderson, 5 Ind. 34; Dow *v.* Whitman, 36 Ala. 604; Gibbs *v.* Shaw, 17 Wis. 197; Sitzman *v.* Pacquette, 13 Wis. 291; Cooper *v.* Sunderland, 3 Iowa, 114; Thornton *v.* Mulquinne, 12 Iowa, 549; Gelstrop *v.* Moore, 26 Miss. 206; Clark *v.* Holmes, 1 Doug. (Mich.) 391; Palmer *v.* Oakley, 2 Id. 472; Greenvault *v.* F. & M. Bank, Id. 498; Hawley *v.* Mead, 52 Vt. 343; Rollins *v.* Clement, 49 Vt. 98; Folsom *v.* Connor, 49 Vt. 4; Kidder *v.* Hadley, 25 Vt. 544; Whitney *v.* Silver, 22 Vt. 634; Alexander *v.* Abbott, 21 Vt. 476; French *v.* Hoyt, 6 N. H. 370; Pope *v.* Cutler, 34 Mich. 152; Gillett *v.* Needham, 37 Mich. 143; Arnold *v.* Nye, 23 Mich. 292; Ryder *v.* Flanders, 30 Mich. 341; Corwin *v.* Merritt, 3 Barb. 341; Sheldon *v.* Wright, 5 N. Y. 518; Ridgeney *v.* Coles, 6 Bosworth. (N. Y.) 486; Sibley *v.* Waffle, 16 N. Y. 185; Bloom *v.* Burdick, 1 Hill, 140; Dakin *v.* Hudson, 6 Cow. 222; Floyd *v.* Black. Litt. Sel. Cas. 11.

mons, so far as proceeding against the attached property of the nominal defendant is concerned, it is entitled to equal importance as a matter of record.

Publication notice alone, without the actual attaching and continuous holding of the debtor's property is of no avail;[1] though the case would be different were the defendant reached by summons. Publication is therefore not the equivalent of summons, so far as the defendant is concerned, but only so far as it relates to attached property; but the reason for making it of record is as sound, even in the absence of a statutory requirement. The recorded notice shows that the owner has been given opportunity to appear, but there is in the personal suit no substitute for service. The defendant cannot be brought into court, and subjected to its jurisdiction, by any less or different means. It is misleading to treat publication notice as a substitute for service on the defendant, so far as the personal suit is concerned: it is such only so far as the proceeding is against attached property.[2]

It is also important to note the difference between proceedings against attached property, with respect to the debtor-owner, and those against things irrespective of owners, in the matter of publication. In the former, it is a substitute for summons: in the latter it is not, and cannot possibly be, for the reason that no summons is ever issued. In the former, the notice is as limited as the summons: in the latter, it is "to all persons having, or pretending to have any right, title or interest in or to" the property against which the proceeding is instituted. The legal reader will see that to hold publication notice a non-essential in an attachment suit after summons has failed is to hold the issue of the summons itself, in the first instance, to be a non-essential. It is needless, however, to anticipate in

[1] Pennoyer *v.* Neff, 95 U. S. 714.

[2] Notice by publication may be substituted for service, so as to bind the defendant personally, if he has previously assented to such substitution in some legally prescribed method: Vallee *v.* Dumergue, 4 Exch. 290; Lafayette Ins. Co. *v.* French, 18 How. (U. S.) 404; Gillispie *v.* Commercial Mutual Marine Ins. Co., 12 Gray, 201.

this place, a matter rather belonging to a question of jurisdiction.

Whether publication notice when thus standing in lieu of summons for the purposes of the property action, must always, as a jurisdictional fact, appear in the record of attachment proceedings; whether it may be presumed when omitted, or treated as a non-essential, in case of a collateral attack upon a judgment under which attached property has been sold, are questions that more appropriately appertain to jurisdiction.

It is sufficient to suggest here that even if, under decisions in some of the States, judgments have been sustained when collaterally attacked, though the record showed no summons served and no notice published and no appearance of the defendant, it is yet the safer course even in those States to have the notice duly entered of record. In other States, where such notice is required to be of record like all other jurisdictional facts, and where an attachment judgment is absolutely void when without record proof of the fact, the important entry is no more to be overlooked than a served summons in a personal suit against a defaulted defendant. Everywhere, the record evidence is essential to avoid the reversal of a judgment for the attaching creditor. Always, therefore, in every State, the plaintiff's counsel should not only have publication made in default of summons, but also see that it is properly entered of record. In whatever way the publication may be proved in different States, the statutory requirement of notice cannot be disregarded without rendering the proceedings absolutely void.

CHAPTER IX.

THE PROPERTY IN COURT.

§ 1. Custody by the Sheriff.
2. Keepers, Receiptors, etc.
3. Defendant Holding under the Sheriff.
4. The Garnishee's Possession
5. Sale of Perishable Goods.
6. Loss of Custody.

Sec. 1. Custody by the Sheriff.

When the return shows that property of the debtor has been validly attached, the court, in contemplation of law, is in possession of the *res* and may exercise control over it. It is necessary to an attachment suit, as it is in any proceeding *in rem*, that the property be in court. The custody by the sheriff is not adverse to the judicial possession but under the authority of the court. The custody by a keeper is under the marshal, sheriff, constable or other executive officer; so also, the possession by a receiptor, or by the debtor himself under a forthcoming bond, is entirely subordinate to that of the responsible executive officer, and all are under the court; the attached property is none the less in court by reason of its having been entrusted to any subordinate custodian.

The immediate relation of the court to the property is through the executive officer, to whom judicial orders respecting the custody, preservation, sale or delivery are addressed. The entrusting of property to keepers or receiptors is done by that officer himself, pursuant to law; and even the temporary and contingent release to the defendant on a forthcoming bond is his business in many of the States. And even property or a credit of the defendant, attached in the hands of a third person, is deemed to be in court for all the purposes of the suit.

The sheriff must exercise care and diligence in the keeping and preservation of the property attached, and he is legally

responsible therefor to whom it may concern.[1] He is not responsible beyond reasonable watchfulness, precaution and the employment of proper means of security. He ought to be even more careful than owners ordinarily are. He would not be doing his duty should he leave the door unlocked in which attached goods are stored with no keeper on guard, though owners are accustomed to leave many species of property thus exposed. This is because they are in more danger of being molested than goods not under seizure. He is not liable, however, when attached property perishes without his fault.[2]

If, to avoid expense, or for other reason, the plaintiff should obtain an order of court directing the officer to dispense with the keeper, the sheriff, though still bound to due diligence, could not be held responsible to the plaintiff for any loss traceable to the want of a keeper. The plaintiff, to effect the discharge of the keeper, should apply to the court: not to the executive officer.[3]

Efficient care and diligence, in the protection and preservation of the things attached, is required; such care as is reasonable and necessary for the protection and preservation of property under seizure and subject to litigation; and courts always take into consideration the circumstances of each case.[4]

[1] Becker *v.* Bailies, 44 Ct. 167; Bridges *v.* Perry, 14 Vt. 262; Cutter *v.* Howe, 122 Mass. 541; Davis *v.* Stone, 120 Mass. 228; Weaver *v.* Wood, 49 Cal. 297; Kendall *v.* Morse, 43 N. H. 553; Lovejoy *v.* Hutchins, 23 Me. 272; Clerk *v.* Withers, 2 Lord Raymond, 1075; Mildmay *v.* Smith, 2 Saund. 343; Wilbraham *v.* Snow, Id 47.

[2] Ide *v.* Fassett, 45 Vt. 68; Cross *v.* Brown, 41 N. H. 283; Shaw *v.* Laughton, 20 Me. 266; Falls *v.* Weissinger, 11 Ala. 801.

[3] The Independent, 9 Ben. 489.

[4] Starr *v.* Moore, 3 McLean, 354; Farris *v.* The State, 33 Ark. 70; Adler *v.* Roth, 2 McCrary 445; Runlett *v.* Bell, 5 N. H. 433; Howard *v.* Whittemore, 9 N. H. 134; Barron *v.* Cobleigh, 11 N. H. 557; Kendall *v.* Morse, 43 Id. 553; Bruce *v.* Pettengill, 12 Id. 341; Bridges *v.* Perry, 14 Vt. 262; Johnson *v.* Edson, 2 Aikens, (Vt.) 299; Brown *v.* Richmond, 27 Vt. 583; Gilbert *v.* Crandall, 34 Id. 188; Briggs *v.* Taylor, 28 Id. 180; Phillips *v.* Bridge, 11 Mass. 242; Tyler *v.* Ulmer, 12 Id. 163; Congdon *v.* Cooper, 15 Id. 10; Cooper *v.* Mowry, 16 Id. 5; Sewall *v.* Mattoon, 9 Id. 535; Fettyplace *v.* Dutch, 13 Pick. 388; Hemmenway *v.* Wheeler, 14 Id. 408; Sanderson *v.* Edwards, 16 Id. 144; Donham *v.* Wild, 19 Id. 520; Lawrence *v.* Rice, 12 Met. 527; Dorham *v.* Kane, 5 Allen, 38; Pierce *v.* Strickland, 2 Story, 292; Adams *v.*

It is the officer's right and duty to protect the property in his charge from trespassers, and they are directly liable to him.[1]

Upon the dissolution of attachment, it is his duty to restore the *res* to the defendant—not the immediate duty of the plaintiff, since the latter has no possession.[2] In his capacity as custodian under the court, in consideration of his ultimate duty to have the property ready for execution should there be judgment for the plaintiff, or to return it to the defendant should there be judgment in favor of the latter, he has such present legal right of property in it that he may sue and be sued concerning it, in his own official character.

Legal and constructive possession and actual control must be maintained though the property be not susceptible of manipulation, and though the seizure was effected by giving notice or by whatever other method may have been most practicable, in conformity to statute. Machinery bolted or otherwise fastened

Balch, 5 Me. 188; Jenney *v.* Delesdernier, 20 Me. 183; Twombly *v.* Hunnewell, 2 Me. 221; Rice *v.* Wilkins, 21 Id. 558; Tukey *v.* Smith, 18 Id. 125; Childs *v.* Ham, 23 Id. 74; Farnham *v.* Gilman, 24 Id. 250; Lovejoy *v.* Hutchins, 23 Id. 272; Bennett *v.* Brown, 31 Barb. 158; McKay *v.* Harrower, 27 Id. 463; Moore *v.* Westervelt, 1 Bosworth, 357; Dick *v.* Bailey, 2 La. Ann. 974; McComb *v.* Reed, 28 Cal. 281; Sagely *v.* Livermore, 45 Id. 613; Weaver *v.* Wood, 49 Id. 297; Newman *v.* Kane, 9 Nev. 234; State *v.* Baldwin, 10 Bissell, 165.

[1] Smart *v.* Bachelder, 57 N. H. 140; Ordiorne *v.* Colley, 2 Id. 66; Sinclair *v.* Tarbox, Id. 135; Goodrich *v.* Church, 20 Vt. 187; Whitney *v.* Ladd, 10 Id. 165; Barker *v.* Miller, 6 Johns. 195; Hotchkiss *v.* McVicker, 12 Id. 403; Ladd *v.* North, 2 Mass. 514; Warren *v.* Leland, 9 Id. 265; Perley *v.* Foster, Id. 112; Ludden *v.* Leavitt, Id. 104; Gibbs *v.* Chase, 10 Id. 125; Gates *v.* Gates, 15 Id. 310; Gordon *v.* Jenney, 16 Id. 465; Whittier *v.* Smith, 11 Id. 211; Harriman *v.* Gray, 108 Mass. 229; Pool *v.* Symonds, 1 N. H. 289; Huntington *v.* Blaisdell, 2 Id. 317; Lovell *v.* Sabin, 15 Id. 29; Butterfield *v.* Clemence, 10 Cush. 269; Stront *v.* Bradbury, 5 Me. 313; Nichols *v.* Valentine, 36 Me. 322; Walker *v.* Foxcroft, 2 Id. 270; Torrey *v.* Otis, 67 Me. 573; Wadsworth *v.* Walliker, 45 Iowa, 395; Lathrop *v.* Blake, 3 Fos. 46; Lowry *v.* Walker, 5 Vt. 181; Whitney *v.* Ladd, 10 Id. 165; Adler *v.* Roth, 2 McCrary, 445; Utley *v.* Smith, 7 Vt. 154; Brownell *v.* Manchester, 1 Pick. 232; Badlam *v.* Tucker, Id 389; Stiles *v.* Davis, 1 Black, 101; Rhoads *v.* Woods, 41 Barb. 471; Farris *v.* The State, use, etc. 33 Ark. 70; Atkins *v.* Swope, 38 Id. 528; Foulks *v.* Pegg, 6 Nev. 136; U. S. *v.* McDonald, 8 Biss. 439.

[2] Blanchard *v.* Brown, 42 Mich. 46.

to the freehold, need not be removed by the sheriff for the purpose of getting legal possession and control; and he need not detach it in order to maintain his possession.[1]

Land is attached by giving notice to the tenant in possession, making proper return, recording the lien when required, etc., and there is no need of the appointment of a keeper to maintain the possession; but the legal custody must be maintained as in the case of personal property. Whatever would operate a displacement of the lien created by the constructive seizure, so that the property could be transferred by the defendant free from incumbrance, would be equivalent to the relinquishment of the legal possession; and, if such result should prove to have been caused by any action or negligence of the sheriff or marshal, or of those under his authority, he would be responsible.

The sheriff may keep attached goods under lock and key in a warehouse, or otherwise and elsewhere, under his own immediate care; but it is usual to entrust them to the care of a keeper selected in consideration of his trustworthiness. Keepers are often necessary to secure the safety of attached goods or other articles of personal property, especially when there are several cases of seizure in court so that it may become impracticable for the sheriff to become the personal and immediate custodian of all. Keepers are the servants of the sheriff, subject to his direct commands, while he continues amenable to the court as the only custodian judicially recognized as responsible for the safe-keeping and certain forthcoming of the property upon which the jurisdiction rests.

Goods attached are often allowed to remain in the store or warehouse in which they are found, since this is usually most to the interest of all parties concerned, and prevents the loss, intermixture and confusion which removal would be likely to cause; but, when such building is not itself one of the subjects of the attachment, but is the property of the defendant, or his

[1] Patch *v.* Wessels, 46 Mich. 249; Hatch *v.* Fowler, 28 Id. 211. So of farming products, in bulk, stored in a barn: Woodman *v.* Trafton, 7 Me. 178; Carr *v.* Farley, 12 Id. 328. So of a growing crop: Grover *v.* Buck, 34 Mich. 519. So of corded wood: Molm *v.* Barton, 27 Minn. 530.

lessor or some other person, the sheriff cannot detain the goods there as a matter of right.[1]

Sec. 2. Keepers, Receiptors, &c.

Attached property, though entrusted to a receiver, remains *in custodia legis.*[2]

A debtor gave a bill of sale of personal property, and agreed that the nominal vendee, (who was a mortgagee,) should hold the property till a debt, owing to that vendee and another person, should be paid. Another creditor attached the property. The vendee was made keeper. He subsequently conveyed his interest to his own co-creditor and delivered the property to him. Under these circumstances it was held error to charge the jury that the attachment lien was lost by the sheriff's leaving the property in the possession of the mortgagee as keeper.[3] Indeed, while the property was lawfully in the hands of the holder of a perfect lien, what right would the officer have had to take it out of them for the purpose of creating a hypothetical one? The court said that by accepting the trust as keeper, the mortgagee was estopped from denying the validity of the attachment lien. It certainly seems that the mortgagee could have done better than accept the appointment from the sheriff; he might have stood upon his prior right to hold as a chattel mortgagee in possession.

It is a common practice, in some of the States, for the sheriff to entrust attached property to receiptors. He takes from them written acknowledgements showing that they hold the property under him, subject to be returned to him on his demand. Such a receiptor may be the friend of the attachment debtor, and may really accept the position of bailee in the interest of the debtor who is still the owner of the property and presumptively not indebted as charged; but the receiptor is legally the sheriff's servant, bound to hold under him, to preserve and protect the property for him, and to have it forth-

[1] Williams *v.* Powell, 101 Mass. 467; Newton *v.* Adams, 4 Vt. 437; Rowley *v.* Rice, 11 Met. 337; Malcom *v.* Spoor, 12 Id. 279.

[2] Wall *v.* Pulliam, 5 Heisk. 365.

[3] Moresi *v.* Swift, 15 Nev. 215.

coming for the purposes of the attachment suit when required.

The sheriff is not bound to turn property over to a receiptor, even where that practice is prevalent. He may wisely decline to do so unless well secured by bond. It would be unsafe to do so without security, unless the plaintiff has previously consented to such arrangement and thus exonerated the sheriff from all danger of subsequent blame and claim for damage.

The attached property should be described in the receipt; there should be an inventory if there are several articles; there should always be such particularity as to render the property easily susceptible of identification.[1]

A bailee to whom attached property is entrusted by the sheriff is the agent of that officer for keeping it—not of the plaintiff or defendant. It is still in the constructive possession of the court; still legally in the hands of the sheriff by the bailee holding under him as his representative, or agent, or servant.[2]

The receiptor, while thus holding things pending the suit, has no such possession as would enable him legally to turn them over to the defendant free from lien, to sell them, or otherwise to dispose of them.[3] He cannot appropriate the things to himself, subject them to his own use, and offer to return equiva-

[1] Anthony *v.* Comstock, 1 R. I. 454.

[2] Dudley *v.* Lamoille County Bank, 14 Fed. Rep. 217. "The mere servant of the sheriff:" Ludden *v.* Leavitt, 9 Mass. 104; reaffirmed: Warren *v.* Leland, Id. 265; the receiptor is the sheriff's servant, and the sheriff retains the lawful possession: Brownell *v.* Manchester *et al.* 1 Pick. 232; receiptor considered "in no other character than as the servant of the officer:" Bond *v.* Padelford, 13 Mass. 395; "mere servant:" Commonwealth *v.* Morse, 14 Mass. 217. To the same effect: Barker *v.* Miller, 6 Johns. 195; Brown *v.* Cook, 9 Id. 361; Dillenback *v.* Jerome, 7 Cow. 294; Roberts *v.* Carpenter, 53 Vt. 678; Mitchell *v.* Hinman, 8 Wend. 667; Bangs *v.* Beacham, 68 Me. 425; Torrey *v.* Otis, 67 Me. 573; Small *v.* Hutchins, 19 Me. 255; Eastman *v.* Avery, 23 Id. 248; Farris *v.* The State, use, etc. 33 Ark. 70; Gilbert *v.* Crandall, 34 Vt. 188. The depositary of attached property is the servant of the sheriff: Meshew *v.* Gould, 30 La. Ann. Part I., 163.

[3] Bacon *v.* Daniels, 116 Mass. 474; Bangs *v.* Beacham, 68 Me. 425; Sibley *v.* Story, 8 Vt. 15; Stimson *v.* Ward, 47 Vt. 624; Haynes *v.* Morgan, 3 Mass. 208; Ball *v.* Claflin, 5 Pick. 303.

lents or pay the value; for the officer has no right to take from him an alternate obligation.[1]

Since the holding of the receiptor is under the sheriff; since the latter retains the legal possession and control so that the property is still deemed to be in court, the attaching creditor's lien is not divested by the physical passage of the property into the hands of the receiptor.[2]

It is certainly in the power of the receiptor to destroy the lien in various ways. He may physically deliver it to the defendant, or whisk it off beyond the jurisdiction, or commit it to the flames. The sheriff, by reason of his rightful control, may retake the property from the defendant, pursue it beyond the jurisdiction and regain it by legal process there and bring it back, or rescue it from the fire, if he can. But if he cannot, the lien of the plaintiff could not possibly be perfected by judgment, and the court's jurisdiction over the lost *res* would be ousted. The plaintiff would hold the sheriff responsible; the sheriff would hold the receiptor responsible, but the lien would be lost by the receiptor's illegal act.

There is nothing specially remarkable in this, for an ordinary keeper or the sheriff himself might destroy, transport or abandon attached property so as to defeat the lien and divest the jurisdiction so far as the proceeding directly against the property is concerned.

The abandonment of attached property to the defendant by the receiptor, being an illegal act entitled to no favor, does not *ipso facto* divest the sheriff of his legal possession, since the right remains in him to take actual possession whenever he can,

[1] Page *v.* Thrall, 11 Vt. 230; Waterhouse *v.* Bird, 37 Me. 326; Waterman *v.* Treat, 49 Id. 309; Lamb *v.* Day, 8 Vt. 407; Sibley *v.* Story, 8 Id. 15; Dean *v.* Bailey, 12 Id. 142; Paul *v.* Slason, 22 Id. 231; Briggs *v.* Gleason, 29 Id. 78; Collins *v.* Perkins, 31 Id. 624.

[2] Roberts *v.* Carpenter, 53 Vt. 678; Mitchell *v.* Gooch, 60 Me. 110; Bean *v.* Ayers, 70 Me. 421; Whitney *v.* Farwell, 10 N. H. 9; Kelly *v.* Dexter, 15 Vt. 310; Rood *v.* Scott, 5 Id. 263; Beach *v.* Abbott, 4 Id. 605; Pierson *v.* Hovey, 1 D. Chipman, (Vt.) 51; Enos *v.* Brown, Id. 280; Stowe *v.* Buttrick, 125 Mass. 449; Woodward *v.* Munson, 126 Mass. 102; Tomlinson *v.* Collins, 20 Ct. 364. The sheriff retains legal possession of money attached and left in the hands of a third person who gives no receipt therefor: Watkins *v.* Cawthorn, 33 La. Ann. 1194.

and to deprive the receiptor of the trust he is about to abuse, or deprive the defendant of the property when the trust has been thus abused.[1]

Whether or not the lien is lost by the unlawful restoration to the defendant, depends upon attendant circumstances. If the sheriff knowingly lets personal property remain in the debtor's hands so that he ceases to be the legal custodian, and the debtor conveys them to an innocent third person purchasing for value and getting delivery, the court's control would be broken, and the lien by attaching would be lost.[2]

When the sheriff takes a receipt, with the alternate obligation assumed by the receiptor, to return the goods on demand or pay their value, (which is illegal, and to be construed as a promise to return the goods,[3]) it seems that the lien would be lost immediately upon his restoration of the property to the defendant.[4]

The receiptor cannot avail himself of trifling errors in the proceedings for the purpose of avoiding his obligations.[5]

[1] Bean *v.* Ayers, 70 Me. 421; Woodward *v.* Munson, 126 Mass. 102. Cases cited in preceding note, and Briggs *v.* Mason, 31 Vt. 433; Rood *v.* Scott, 5 Id. 263; Sibley *v.* Story, 8 Id. 15; Bond *v.* Padelford, 13 Mass. 394: "The special property remained in him [the sheriff,] and he had a complete right to the possession." Odiorne *v.* Colley, 2 N. H. 66; Whitney *v.* Farwell, 10 Id. 9.

[2] Baker *v.* Warren, 6 Gray, 527; Whitney *v.* Farwell, 10 N. H. 9; Davis *v.* Miller, 1 Vt. 9; Baker *v.* Fuller, 21 Pick. 318; Tomlinson *v.* Collins, 20 Ct. 364; Thompson *v.* Baker, 74 Me. 48.

[3] Sibley *v.* Story, 8 Vt. 15.

[4] In Robinson *v.* Mansfield, 13 Pick. 142, it was insisted upon by counsel that notwithstanding the restoration to the defendant of attached property, by one Kimball, receiptor, the sheriff retained the legal possession, etc., but the court said: "This objection is invalid, for the lien had been discharged, and the obligation of Kimball substituted for the goods. It has always been held, that where goods attached are placed in the custody of a receiptor in the usual mode, and delivered to the debtor, they may be conveyed by the debtor or be attached again at the suit of another creditor." In Denny *v.* Willard, 11 Pick. 519, it is held that the defendant may sell property returned to him by a receiptor, and that if they remain subject to the attachment, the general property will pass by the sale, subject only to the lien. Of course, any attachment defendant may sell subject to the lien, even when his attached property is under the sheriff's bolts and bars.

[5] Hunter *v.* Peaks, 74 Me. 363, where a receiptor sought to avail himself of an error in the defendant's name—C. Wood instead of Robert C. Wood. In Shaw *v.* O'Brion,

The true rule seems to be that the court's possession and jurisdiction remain inviolate, even when the property is physically in the defendant's hands, if he holds under the sheriff after attachment and after it has been entrusted to a bailee or receiptor, provided he derives his custody of it from such receiptor and does not have any independent right to hold. If he is permitted to hold adversely to the sheriff, it is not possible that the court's possession can also be maintained, and the attachment lien preserved.[1] Whoever may be the agent holding under the sheriff, the latter must have the legal possession and control; and, unless there are circumstances justifying constructive possession, it must be actual, in the hands of the officer or his agent.[2]

The relation of the receiptor is to the sheriff; he is not directly the agent of the court in his custody of the property, but a sub-agent; he is the direct representative of the executive officer; and if he has any cause of complaint, he must look to his immediate principal, and may sue him.[3]

When the immediate principal is released from his duties as custodian, by the dissolution of the attachment, it is for him to discharge the receiptor. When the latter was appointed administrator of the estate of the defendant, it was held that his office of keeper ceased because the death dissolved the attachment.[4]

When his goods are detained in the store-house of the defendant, with his assent, it is not uncommon for the seizing officer to appoint the defendant's storekeeper or warehouseman to be the keeper under the attachment. Under such appointment, the warehouseman becomes the servant of the sheriff, and the goods are legally in court. The sheriff may appoint

69 Me. 501, the error of writing "Augustu" instead of "Augustus" in the certificate of a register of deeds was held fatal, so that no lien was created on the estate of "Augustus." But this is not inconsistent with the case above cited respecting receiptors of attached property.

[1] Bridge *v.* Wyman *et al.* 14 Mass. 190, 195; Whitney *v.* Farwell, 10 N. H. 9; Thompson *v.* Baker, 74 Me. 48; Bicknell *v.* Hill, 33 Me. 297; Wadsworth *v.* Walliker, 45 Iowa, 395.

[2] Adler *v.* Roth, 2 McCrary, 445.

[3] Stowe *v.* Butrick, 125 Mass. 449.

[4] Dwyer *v.* Benedict, 12 R. I. 459. But see McClellan *v.* Lipscomb, 56 Ala. 255.

any other than the warehouseman; or, he may remove him after appointment and substitute another keeper, since the court will look to the officer himself for the faithful custody of the property.[1] It is therefore not as the defendant's employee that such person is selected, since he must divest himself of that character upon accepting the appointment. To leave the goods in his charge while he is yet the representative of the attachment debtor would be equivalent to their restoration to the defendant, which would be an abdication of jurisdiction and relinquishment of lien.[2]

Were household goods seized, and the debtor's wife made keeper (where the statute allows married women to do business on their own account, independent of their husbands,) and she permitted to use the goods in the family as usual, they must be held by her as the subordinate of the sheriff who is responsible for their safe keeping and preservation and all loss of "wear and tear" in such an extreme case. And so also, when any other keeper allows the debtor's family to use attached goods.[3]

Sec. 3. Defendant Holding under the Sheriff.

If, under the operation and authorization of a statute, the sheriff may leave attached property in the hands of the defendant, it is always only as agent that the latter holds. He cannot, under any statute, have legal possession independent of the sheriff and of the court, after attachment, without destruction of the entire effect of the act of seizing under the writ. He must hold under the sheriff; be amenable to the orders of the sheriff

[1] Frounstein *v.* Rosenham, 22 La. Ann. 525; Train *v.* Wellington, 12 Mass. 495; Baldwin *v.* Jackson, Id. 131.

[2] Montpelier & Wells River R. R. Co. *v.* Coffrin, 52 Vt. 17; Charnock *v.* Colfax, 51 Iowa, 70; Gower *v.* Stephens, 19 Me. 92; Pillsbury *v.* Small, Id. 435; Pomroy *v.* Kingsley, 1 Tyler, (Vt.) 294; Flanagan *v.* Wood, 33 Vt. 332; Taintor *v.* Williams, 7 Ct. 271; Knap *v.* Sprague, 9 Mass. 258; Baker *v.* Warren, 6 Gray, 527; Thompson *v.* Baker, 74 Me. 48; Farris *v.* The State, use, etc., 33 Ark. 70.

[3] Farrington *v.* Edgerley, 13 Allen, 453; Young *v.* Walker, 12 N. H. 502; Bagley *v.* White, 4 Pick. 395; Bridge *v.* Wyman *et al.* 14 Mass. 190; Baldwin *v.* Jackson, 12 Id. 132; Train *v.* Wellington, Id. 497; Denny *v.* Warren, 16 Id. 420; Gordon *v.* Jenny, Id. 465.

so that the latter may always be enabled to obey the court when mandates are issued concerning the property. There cannot be even constructive custody unless the sheriff or other officer immediately under the court has actual control so as to be really the legal custodian.

If, upon his own responsibility, the sheriff leaves property which is susceptible of actual manipulation and removal, in the hands of the attachment debtor, taking his receipt therefor, such officer would be answerable to the attachment plaintiff for thus destroying the lien, should it thus be destroyed. Whether or not it would be, depends entirely upon the legal capacity in which the defendant holds possession. Is his arrangement such that he cannot sell his property free from incumbrance; cannot deliver it, if sold; cannot administer it except under the surveilance of the sheriff? If so, he cannot set up that the lien is gone. And if third persons have knowledge of such arrangement, they are also estopped. Under such circumstances, (if there is nothing to the contrary in the statutes or settled practice of the State where the proceeding is had,) the entrusting of the property to the defendant upon his receipting for it as keeper is not necessarily and invariably a ground for the dissolution of the attachment.[1] The defendant may agree to pay the sheriff for the keeper;[2] or he may agree to pay the plaintiff, in which case the keeper's wages need not be taxed as costs, yet the plaintiff may sue the defendant on such an agreement.[3]

Where property is attached for a debt not due, the attachment is the gist of the action, and the court in which it is brought has jurisdiction and power to protect the sheriff in his possession. In such case, if land has been attached, the court from which the writ is issued may prevent the defendant from wasting the lands, cutting timber, etc., and the attaching

[1] Congdon *v.* Cooper, 15 Mass. 10; Cooper *v.* Mowry, 16 Id. 8; Carr *v.* Farley, 12 Me. 328; Woodman *v.* Trafton, 7 Id. 178; Philips *v.* Bridge, 11 Mass. 242; Bridge *v.* Wyman, 14 Mass. 190; Lyman *v.* Lyman, 11 Id. 317; Constructive possession: Moresi *v.* Swift, 15 Nev. 215.

[2] Murtagh *v.* Connor, 15 Hun. 488; Brown *v.* Cooper, 65 How. Pr. 126.

[3] Clark *v.* Gamwell, 125 Mass. 428.

creditor or the sheriff need not resort to another court for an injunction.[1]

Sec. 4. The Garnishee's Possession.

The character of the garnishee's lien is that of a depositary. The lien is a mere right to hold, not a right in the thing to secure debt. And this right to hold is not created by the summons, but must be existent before the service of the process of garnishment. It is derived from the owner of the goods. The only effect which the garnishment has upon the right to hold is to render it inalienable while the garnishment is pending.

The action which the garnishee has against a person disturbing his possession is not because he is a garnishee but because he is the lawful possessor. Any despositary has an action against the disturber of his lawful possession of the property of another.

The divested garnishee can recover only nominal damages if no loss has been entailed. His action would be like that of one seizing officer against another who has divested him of possession, after it turns out that the second seizure holds good through judgment and execution while the first becomes nugatory by subsequent failure of the plaintiff, who caused its issue, to obtain judgment. An action of trespass would lie but only nominal damages could be recovered.[2]

This qualified property right is such that the garnishee may insure the goods which he holds, may sue those who disturb his possession without bringing his action in the name of either the attaching creditor or of the owner of the property. His position is similar to that of a sheriff who holds attached property, who certainly may protect it in his own name.[3]

The garnishee is considered to have a sort of special property

[1] Cooney *v.* Moroney, 45 Iowa, 293: Injunction had been issued in the District Court, and motion made to dissolve it on the ground that it affected the subject matter of the attachment suit in the Circuit Court. Under § 3389 of the Iowa Code, held as stated in the text. No action could have been brought on the debt not due, except aided by attachment. Id. § 2956. *Vide* McClain's Stat.

[2] Goodrich *v.* Church, 20 Vt. 187.

[3] White *v.* Madison, 26 How. Pract. 481.

in that which is seized in his hands. He has no right to sell or otherwise dispose of it. He is accountable to neither the plaintiff nor the defendant, but he will be accountable to one or the other at the end of the litigation. Should he relinquish possession in favor of the owner or of a stranger, he would thus destroy the plaintiff's lien but would make himself immediately responsible to the plaintiff to the degree of injury already inflicted, and to the entire value of the property should the claim cover it all, and should the claim be lost by reason of the wrongful relinquishment of possession.

The garnishee's qualified property in the thing seized in his hands is, in one sense, independent of both parties, since it is yet uncertain to which he may be eventually accountable. The attaching creditor cannot, on motion, obtain an order to have the property delivered to the sheriff.[1]

Goods subjected to garnishment rightly remain in the garnishee's hands till judgment and execution. If, however, they are seized wrongfully by the sheriff in execution of a judgment in another suit, they ought to be held subject to the lien created by the garnishment. If not so held, but executed to satisfy the judgment upon which the sheriff seized, that officer would be responsible to the garnishee for whatever the latter should be condemned to pay to the attaching creditor in the first suit; or, he would be responsible to that creditor upon the maturity of his garnishment lien by judgment.

However much the goods may exceed in value the claim of the first attaching creditor, the second should proceed by garnishment whether he already has judgment or not, and so should all who look to those goods for the making of their money: the goods meanwhile remaining in the hands of the garnishee, whose right to hold them, originally derived from the defendant, becomes a duty by reason of the summons. Therefore if the goods should be seized under process and taken out of his hands, it is clear that he ought to have his remedy against the seizing officer who thus subjects him to any loss.

The garnishment puts the goods in such position relative to

[1] Hall *v.* Brooks, 89 N. Y. 33.

other creditors of their owner as a seizure in execution puts property relative to those who have junior executions. Property seized by a sheriff in execution, though worth much more than what is necessary to satisfy the judgment, cannot be taken out of the sheriff's hands, nor can any portion of it be so taken, under the later executions. The junior creditors must put their writs in the sheriff's hands, and abide their turn after the first execution has been satisfied. So when one garnishment has been made, others may be made, but the goods should be left with the garnishee. And when an execution by a judgment creditor comes into competition with the immature lien of an attaching creditor, the goods subjected to garnishment ought to be left with the garnishee and not taken into the actual custody of the seizing officer. No injury to the garnishee, or to the plaintiff in garnishment, may result by such taking, if the sheriff holds them subject to judgment upon the garnishment; for the garnishee, having no interest beyond being held harmless, may not be wronged by deprival of possession, provided the goods are forthcoming when needed to satisfy the garnishment-creditor's demand. So the latter, if neither hindered nor defeated by the actual subsequent seizure, would have nothing of which to complain: the officer holding the goods subject to the garnishment.[1]

The garnishee is frequently said to be a mere stake-holder. Owing a debt, it matters nothing to him whether he pays it to the plaintiff or to the defendant, provided his obligation to the latter is cancelled. Holding property not his own, it matters nothing to him whether he delivers it to the plaintiff for the purpose of execution, or to the defendant-owner, provided such delivery acquits him of all responsibility. It is when the third person is thus wholly disinterested that the process of garnishment is rightly applied to him. He cannot justly be subjected to the process to his own injury. He cannot be made to pay his debt before it is due, nor to deliver goods during the time

[1] Burlingame *v.* Bell, 16 Mass. 318; Swett *v.* Brown, 5 Pick. 178; Rockwood *v.* Varnum, 17 Pick. 289.

in which he may, by previous contract or otherwise, be entitled to retain them.

Whatever his position towards the defendant, he must respect the summons and make honest answer whether he is indebted to, or holds property of, the defendant, with such qualification and explanations as may show the nature of such indebtedness or possession. However annoying it may be to be drawn thus between the parties to a legal quarrel, he must respect the summons and answer, since, if he has no property of the defendant and owes him nothing, a failure to answer would be to run the risk of being condemned to pay the judgment when rendered in favor of the plaintiff. He must be straight-forward, impartial and prompt, whether indebted or not, though he may dislike to divulge his relations with the defendant, and may be incidentally harassed by being precluded from the immediate delivery of property not his own and the settlement of a debt which he would prefer to pay without delay.

If he really owes the defendant or holds his property, he should say so in his answer; and he is then bound to hold what he has for account of whom it may concern. He cannot change property, convert it into money, or play the owner, but must consider himself as the keeper, just as though appointed such by the sheriff or the marshal in the case of the ordinary seizure of personal property.[1] If the garnishment covers such chattels, *etc.*, of the defendant as may come into his hands after its service upon him, he is equally bound to hold and account for them. He acquires no right of ownership, in any sense; no more than an ordinary custodian appointed by a seizing officer. He is bound to use ordinary diligence to preserve what he thus holds and is responsible in damages for any dereliction in this duty, recoverable by the injured party.

On the other hand, the garnishee loses no rights which he previously possessed. While bound to hold what belongs to the defendant, he is not bound to hold more; and therefore, if he has made cash advances under the general custom of mer-

[1] Mattingly *v.* Boyd, 20 How. 128; Brashear *v.* West, 7 Pet. 608; Briggs *v.* Kouns, 7 Dana, 405. See Staniels *v.* Raymond, 4 Cush. 314.

chants so as to be entitled to their return, to commission and factorage, he has an interest in the goods he holds which is not subject to the garnishment. And this interest is accompanied by the right to sell, according to the usages of trade. He, an innocent third person, would be injured by the garnishment, if such process prevents him from getting his own without awaiting the termination of a law-suit between other parties, with which he has no concern.

Since the debtor himself has no right to forbid his factor to sell under such circumstances, how can the debtor's creditor acquire greater rights through the process of garnishment? He could forbid sale after first tendering the factor his advances; and so could the attaching creditor. Neither could go beyond this without injury to the factor; and, not only injury to him, but to commerce and the public interest.[1]

The general rule that the garnishee is bound to hold and preserve what is attached in his hands, in the same condition as when served with the summons, without changing it or making any disposition of it, must be understood with reference to the usages of business and the true interest of the parties concerned. A bank, holding a note deposited for collection, belonging to the defendant, which comes due after the garnishment of the bank by an attaching creditor, may yet sue upon the note and convert it into money.[2] Were the note nearing prescription, a failure thus to proceed might result in loss to either the plaintiff or defendant, and would certainly be a neglect of the duty of preserving what was meant to be attached. In such case however, not the bank but the defendant's debtor should be made the garnishee.

To recapitulate: A garnishee cannot be lawfully deprived of the possession which he holds as mere custodian, by means of an execution issued in another suit of junior date.[3] Should he be so deprived, the property would still be subject to the garn-

[1] Baugh *v.* Kirkpatrick, 54 Pa. St. 84.

[2] Bank of the State of Missouri *v.* Bredow, 31 Mo. 523. See White *v.* White, 30 Vt. 338; Keyser *v.* Mitchell, 67 Pa. St. 473.

[3] Scofield *v.* Bradlee, 8 Martin, (La.) 475; Erskine *v.* Staley, 12 Leigh, 406.

ishment.[1] He cannot voluntarily divest himself and deliver the property to the defendant.[2] He must hold the goods from the owner, from a purchaser, from every claimant.[3] Even when forcibly divested, he will be presumed responsible for the forthcoming of the property when required; and the *onus* will be upon him to show that he did his full duty as custodian.[4]

Sec. 4. Sale of Perishable Goods.

The court may, by order, cause the sale of perishable property that is under attachment. Such interlocutory judgment is not against the defendant, for it may be rendered before the appearance or default of that party, and before the court has acquired any jurisdiction over him. It may be rendered before the court has acquired any jurisdiction over the attached property in the sense of power to restore or condemn it. It may be rendered when the judge's power is limited to his duty as judicial custodian, charged with the preservation of the property by agency of the sub-custodians who are subject to his behest.

As he is not presumed to know the facts as to the state of a thing seized, he does not order preliminary sale without application to him by the plaintiff or the executive officer directly in charge of it—usually by the former. The application must be followed by proof of the allegations showing the perishable nature of the property and the necessity for its immediate conversion into money. The order contemplates nothing more than such conversion. It is no judgment affecting the claim of the plaintiff, nor the issue made by the defendant if he has already appeared and pleaded, nor any issue that he may afterwards make should his appearance be later than the sale. Neither the order nor the sale affects the lien of the plaintiff, except that they transfer it from the thing thus sold to the cash substitute. In this there is a marked difference

[1] Swett *v.* Brown, 5 Pick. 178; Burlingame *v.* Bell, 16 Mass. 318.

[2] Aldrick *v.* Woodcock, 10 N. H. 99.

[3] Stiles *v.* Davis, 1 Black, 101; Walcott *v.* Kaith, 2 Foster, 196.

[4] Despatch Line *v.* Bellamy Man. Co. 12 N. H. 205; Parker *v.* Kinsman, 8 Mass. 486.

between such disposition of attached property and its delivery upon the execution of a dissolution bond. The lien rests on the price after such sale so that the purchaser gets the object free from the attachment incumbrance, and all intervenors and junior attachers must look to the proceeds; but, after dissolution by bonding, the released property may be re-attached by other creditors; they cannot come in to claim on the bond. They can only come in and thus claim in case the release by the plaintiff has affected their rights and interests in such a way as to render it necessary for them thus to appear, which would be a state of things out of the ordinary. The rule is that they must follow the property itself.

The proceeds are supposed to be as valuable as the article sold; and, if this is true, the defendant, whether in court or not, is uninjured by the transaction. He ought to have opportunity to contest the alleged necessity of the sale, because he is the owner; and, when in court, such opportunity is always accorded, and the order of sale would be irregular were he not permitted to oppose it. But if he shows no good reason against the solicited order, and is merely aiming to reserve to himself an action for damages against the officer, or the plaintiff, or both, for not restoring the property after judgment of restoration, the court should, upon evidence of the perishability of the *res*, order its transmutation to imperishable cash, notwithstanding the remonstrances of the owner.

The plaintiff has rights as well as the owner; he has his hypothetical *jus ad rem;* he has the right of having such contingent lien made certain, if he can sustain his allegations; and, therefore, he has the right of having the perishable lien-bearing property preserved in a new form.

The owner is protected from any abuse of this extraordinary conversion of his property against his own will. If the sheriff should not use due diligence and proper business-like means to dispose of the property at auction so as to obtain a fair price, he would doubtless be liable to respond to the defendant in damages. Whether there finally be judgment of restoration or not, the owner may be damaged by official misfeasance in the matter of the sale; for, in the former case, the owner might not have the

fair value of the auctioned goods restored to him; and, in the latter, not enough would have gone to his credit on the judgment.

The owner, if in court, may protect himself from an ill-advised application for sale, by bonding. If he does not believe his goods to be perishable yet cannot convince the court that he is right, he may take them into his own custody by giving a forth-coming bond. If he does believe them to be perishable, yet fears that they will be sacrificed by the sheriff's auction, he may execute a dissolution bond, and then dispose of them as he would have done had there been no attachment: work them up in his factory; ship them to their original destination in time for the consignee to subject them to the proper and intended uses; or he may sell them for consumption before decay.

Doubtless there are cases working hardship for which the owner has no adequate remedy, such as the granting of the order upon facts which do not warrant it; the exposure at auction when the market is unfavorable; the inability of the owner to protect himself by bonding, and the like. But there are misfortunes incident to almost all litigation, chargeable to our want of control over times and seasons; the fallibility of human judgment, and the inconveniences inseparable from poverty.

Such hardships however are little compared with the insufferable wrong of usurping jurisdiction over a defendant absent, and over his property present by its proceeds, and then justifying such usurpation on the ground of the right to sell the property as perishable. If, without being summoned or notified by publication, and without appearing, the defendant-owner may have his property sold by the judicial custodian to preserve it, at the solicitation and upon the representation of those who are not owners—of those who have not yet established the allegation that they are even creditors of the owner—that is a sufficient interference with private rights and is justifiable only on the plea of necessity. To conclude, because a court may go so far, that it therefore may go farther and render final judgment

against the unnotified debtor, seems unwarrantable, illogical, and repulsive to the instinct of justice.[1]

Sec. 6. Loss of Custody.

It is so well settled that there can be no valid judgment against property when it is not in court, and so many authorities have been cited elsewhere in this treatise upon this point, that it is unnecessary to repeat them here to sustain the proposition.

It is axiomatic that a thing cannot be in two courts at the same time. It cannot be even constructively in both. It follows that if one court is divested by another of the possession and control of the *res* against which a proceeding is pending, it cannot afterwards pronounce a decree against the property. This is true with respect to all proceedings *in rem*, including those limited to the interest of the debtor-owner.

Attention should be called however to an exceptional case. When a State court had been divested of property attached, by a United States court which seized the property as forfeited to the Government because of its enemy character, it nevertheless proceeded to render judgment sustaining the attachment. No notice had been given to the attachment-debtor except by newspaper publication, and he had made no appearance. Neither property nor a personal defendant was in court.

The federal case not resulting in a decree of confiscation, the State court regained the property by a writ of possession after judgment and sold it under execution in behalf of the attachment creditor. The Supreme Court of the United States,

[1] In Paine *v.* Mooreland, 15 Ohio, 435, the court inferred from the fact that there was authority to sell perishable property, that jurisdiction to hear and determine the case existed; that if the court could lawfully order such sale, it could render final judgment against the defendant with privilege on the property, without his appearance, without service upon him, and without publication notice, even though the statute required notice; that the court derived jurisdiction by means of its own process, so that the defendant could be divested of ownership without his opportunity of enjoying his day in court, and the purchaser at the sale invested with a good title: all of which seems untenable and averse to the spirit of the law of attachment and to the governing statute.

in sustaining the title of the purchaser under that sale, remarked: "If the United States authorities had the right to seize the property and take it out of the hands of the law, as a preliminary step to proceedings for confiscation, it would nevertheless seem to be the right of the Chancery Court to re-assume possession when the confiscation proceedings failed and came to an end."[1]

The question is not whether the State court in which the attachment proceedings were had, (a Chancery Court of Tennessee,) could have regained possession after having been divested and *then* could have proceeded to give judgment in favor of the attaching creditor, but whether such judgment could be rendered *before* regaining possession. The Supreme Court seemed to concede that possession had been lost: under such concession could there have been a valid attachment judgment with the *res* and its owner both out of court? If not, could the purchaser's title be good?

Whether the legal possession did not remain all the while in the State Chancery Court was not suggested. The attaching creditor himself intervened in the confiscation proceedings of the federal court and set up his attachment lien. If the lien-bearing property was there then, it certainly was not also in the other tribunal constructively or otherwise. If not, the writ of possession should have been issued and executed before the rendition of the attachment judgment.

The matter resolves itself into a question of jurisdiction: so it cannot be pursued further here without encroaching upon the domain of the next chapter.

[1] Ludlow *v.* Ramsey, 11 Wall. 581, 590.

CHAPTER X.

JURISDICTION.

§ 1. Degrees of Authority at Different Stages of the Suit.
2. Jurisdiction Over the Debtor.
3. Jurisdiction Over the Debtor's Property.
§ 4. Statutory Requisites Jurisdictional.
5. The Court's Authority Special.
6. Territorial Limits.

Sec. 1. Degrees of Authority at Different Stages of the Suit.

A court has authority to entertain applications for attachments when it is legally constituted and clothed with civil powers as a court of law to try attachment suits.

It has authority to grant them when the petitions and affidavits show the contemplated suits to be within the court's limits with respect to the amount involved, the territorial bounds, the property to be attached, etc., and within statute provisions.

It has authority to hold attached property for further procedure, though there has been no defendant served or notified by publication; and even to sell perishable personal property, before any return to summons issued or to publication ordered.

It has authority to try the personal case, when the defendant has been summoned or has appeared, though no property has been attached.

It has authority to try the case against the property when it has been attached, and the debtor notified by publication but not summoned.

It has authority to try the case against both the defendant and the property when both are in court; that is, when the defendant has been served or has appeared, and property of his has been attached and held.

Wherever the word "authority" occurs in the foregoing paragraphs, *jurisdiction* may be substituted. It will be seen that the word is employed in several different senses.

Jurisdiction is a term of many significations. Substituting it for "authority" in the sentences above, it may be said that the court has jurisdiction to entertain an application for a writ of attachment and to grant or refuse it; jurisdiction to keep attached property in custody and even to convert it by sale before trial; jurisdiction to try the cause against the debtor though not his property; or against it and not him; or against both. Besides, the term has other significations. We are accustomed to speak of admiralty jurisdiction or equity jurisdiction as distinguished from that of courts at law; of probate and criminal jurisdiction; of original and appellate jurisdiction; of limited and general jurisdiction; of the territorial jurisdiction of a court, speaking in a general way, without reference to any particular pending cause to be heard and determined; of the federal jurisdiction and that of the States, and the jurisdiction of other nations—using the term without any special reference to judicial authority in the last two illustrations.

At the first stage of an attachment proceeding, it is necessary to the magistrate's right to receive an application that he be legally empowered to take cognizance of it. The statutes confer this jurisdiction on civil courts specified therein, often limiting them to certain amounts, confining them to specified causes of action and to certain grounds for attachment, etc.

When the application, comprised in the petition and affidavit, with the accompanying bond, is in accordance with law, the court has jurisdiction to grant it by issuing a summons to the defendant and a writ for the attachment of his property.

At both these stages, the court usually acts through its minister, the clerk; so that the reception of the application and the issuance of the writ and summons are ministerial acts. The clerk is the court's right hand for such purposes. Where statutes provide that the writ and summons shall be issued by the clerk, the authorization is made with reference to his relation to the court, and the acts are none the less judicial. Statutes never authorize any officer, who has not such relation to the

court, to perform ministerially such judicial functions. The issuance of attachments upon proper showing is such a matter of course that the clerk is legally presumed to have the court's direction whenever he takes the affidavit, files the papers, and prepares and signs the writ and summons. Should he issue an attachment when no statute authority exists, it would be said that the court had no jurisdiction—not that the clerk had none.

A court which has no right to investigate the question whether a debt exists, cannot take jurisdiction of a suit to establish a lien founded on such debt.[1] It must ascertain that it has a right to proceed, before proceeding in any cause.[2] Though it has general jurisdiction, it cannot take steps towards establishing an attachment lien unless the statutory grounds have been laid. It may have acquired jurisdiction over the defendant, yet not have it over his property for want of the laying of the required grounds. If a creditor files a legal petition and an illegal affidavit, and the defendant is summoned, appears and joins issue, the court has jurisdiction to try the personal case but none to try the ancillary attachment proceeding.

On the other hand, if the attachment grounds are well laid, yet no petition or declaration or complaint is filed, there is no suit of which the court can take cognizance. The court is competent to entertain a suit, but it cannot go on to hear and determine the matter of the attachment when there is nothing really before it. If both petition and affidavit have been filed, and bond if required, then the power of the court is limited to the issue of the process, until there shall have been a return made by the officer charged with it.

When the executive officer has returned the writ of attachment executed by the seizure of defendant's property within the court's territorial bounds, the court becomes judicially possessed of the property, but not of magisterial authority over the person of the defendant, if no summons has been issued or served. The court has jurisdiction. But what is meant by

[1] Gay *v.* Eaton, 27 La. Ann. 166. [2] Phillips *v.* Welch, 11 Nev. 187.

the term? It is somewhat vague and misleading to say, without further qualification, that the court has jurisdiction. It has, of the subject-matter, and of the property to a limited degree.

The authority of the court is confined to the custody of the property, its detention and preservation, its conversion from a perishable condition to its money-equivalent when necessary; and to the issuance of all orders required to effect these purposes and bring the defendant into court by service; or, on failure thereof, to notify him by publication.

The foundation for power to hear and determine the cause is laid by the attachment but the superstructure is not thus raised. The *sine qua non* of the suit against the property is the seizure, but that alone confers no authority to try the cause. It is therefore not true, in an unqualified sense, that seizure alone gives jurisdiction in an attachment suit, if the term *jurisdiction* is used as usually defined: *power to try the cause.*

When summons has been returned showing that the defendant has not been found, then the court has power to order publication according to the statute under which the suit has thus far progressed. When the suit is against an absent non-resident, publication may be ordered at once. The issuing of the order, and the beginning of the publication of the notice pursuant thereto, give the court no further extension of jurisdiction over the property attached, and none whatever over the person of the defendant. The full publication and proof of it by the sheriff's return complete the power of the court to hear and determine the cause, so far as the property is concerned.

Jurisdiction, in the sense of power to hear and determine an attachment suit both against the property attached and the defendant personally, is not in the court specially authorized by statute, until the defendant has appeared or has been served, and his property has been attached; but if there has been publication, there is jurisdiction to the amount of the property attached.

The authority advances by successive steps; and it is misleading to speak of jurisdiction without bearing in mind the meaning properly attached to the term in any connection in which it is used.

Sec. 2. Jurisdiction Over the Debtor.

(1.) Jurisdiction over the person of the debtor as a party is acquired by summons served, or by his voluntary appearance.

The defendant is brought into court by the means employed in any civil suit. Apart from the proceeding against his property, there is a distinct action for debt against himself. This action does not derive its authorization from the attachment statute. The creditor's right to sue his debtor personally would remain were such statute repealed. The principal action must exist or the ancillary one cannot; but the latter is not essential to the former. When the attachment has been quashed, or has been dissolved by a bond conditioned upon paying whatever judgment may be rendered, the personal action goes on unimpaired. And, if not dissolved, there may be personal judgment without any privilege upon the property attached. So the principal suit does not differ from any other action for debt; and, so far as concerns the bringing of the debtor into court as a personal party defendant, the method is precisely the same as in any personal suit.

As in an ordinary personal action there is no substitute for service when he defendant does not appear, so in an attachment suit there is none without his consent by which he can be brought into court as a party. There is no process, other than service, by which the court can acquire jurisdiction over a debtor who does not voluntarily appear. If he voluntarily appear there may be personal judgment against him, though he should afterwards withdraw his appearance.[1]

The defendant may consent to some substitution of service, before it is made, so as to bound by it when made.[2] Notice by publication, often erroneously styled "constructive service," does not perform the office of service; it does not render the notified absentee amenable to the court as a personal party to the suit.

If publication notice is really constructive service, what

[1] Creighton *v.* Kerr, 1 Col. 509.

[2] Vallee *v.* Dumergue, 4 Exch. 290; Lafayette Ins. Co. *v.* French, 18 How. (U. S.) 404; Gillispie *v.* Commercial Mutual Marine Ins. Co. 12 Gray, 201.

reason can be given why the court would not thus acquire jurisdiction over the subject of such service, so as to render a personal judgment against him? Why could he not be mulct in costs and be legally condemned to pay any balance of debt which his attached property is insufficient to satisfy? The term "constructive service" has been applied to publication notice, not only by courts and lawyers, but by the compilers of attachment statutes; yet the meaning is usually qualified by its connection in the sentences in which it is used. Where the statute requires that the summons itself shall be published when the officer has failed to find the defendant, that does not make the publication anything more than a notification; the printing of the summons cannot convert it into a service of it, constructive or actual. To get jurisdiction over the person, the court must have him *served* personally or constructively, within its own territorial limits, or he must come into court. As above explained, he cannot be served constructively by publication;[1] nor can the court have him personally cited in another State.

Publication brings nothing into court. It affords the absentee opportunity to come; and it is important and necessary that he be offered his day in court, but it does not bring him in. Though he may have property within the State, subject to the jurisdiction of the State, it is not subject to the jurisdiction of the court when it is not attached, and the suit is against neither person nor thing. Such a suit, even though nominally authorized by statute, is upon assumption of unwarrantable authority, and is *coram non judice, ab initio*.[2]

[1] *Ante*, p. 270.

[2] Pennoyer *v.* Neff, 95 U. S. 714; Phelps *v.* Baker, 60 Barb. 107; Borders *v.* Murphy, 78 Ill. 81; Clymore *v.* Williams, 77 Id. 618; Johnson *v.* Johnson, 26 Ind. 441; Judah *v.* Stephenson, 10 Iowa, 493; Cooper *v.* Smith, 25 Iowa, 269; Morris *v.* Union Pacific R. R. Co. 56 Iowa, 135; Bruce *v.* Cloutman, 45 N. H. 37; Carleton *v.* Wash. Ins. Co. 35 N. H. 162; Eaton *v.* Badger, 33 N. H. 228; Repine *v.* McPherson, 2 Kan. 340; Abbott *v.* Sheppard, 44 Mo. 273; Smith *v.* McCutchen, 38 Id. 415; Miller *v.* Sharp, 3 Randolph, (Va.) 41; Hopkirk *v.* Bridges, 4 Hen. & M. (Va.) 413; Austin *v.* Bodley, 4 Mon. (Ky.) 434; Maude *v.* Rhodes, 4 Dana, (Ky.) 144; Hunt *v.* Johnson, Freeman, (Miss.) 282; Ward *v.* McKenzie, 33 Tex. 297.

It is true that when the defendant is in court, attachment relatively is merely preliminary seizure to aid execution by the conservation of the property, after the statutory grounds have been laid; but, when he is not, it is essential to the existence of the suit; and the jurisdiction is entirely statutory. For, the suit must be either *in personam* or *in rem:* it is neither if both the debtor and his property are out of court. The novel fact that attachment suits are always personal in form does not relieve the plaintiff from the necessity of proceeding really against a thing, under pain of nullity, when there is no personal defendant.

It is urged by the defenders of certain statutes nominally authorizing personal proceedings against debtors merely notified by publication, that there are analogous proceedings universally held valid. They instance suits against non-residents for divorce, after publication notice. Such suits are in the form of personal actions against the unsummoned husband or wife as the case may be, but are really applications to fix the personal *status* of the complainant. It would be more consonant with principle, were the statute authorizations to confine the complainant to an application for an order to fix such *status* after notification by publication to the absent husband or wife, instead of adopting the form of a suit against the absentee who cannot be brought into court. But the substance governs, rather than the form. The proceeding is substantially to fix the *status* of the applicant. This appears from the fact that the applicant must be within the jurisdiction though the other person to be affected by the order need not be. This is just the reverse of a personal suit, when the defendant must be within the jurisdiction though the plaintiff need not be.

The applicant for the judicial fixing of his own *status*, whether a minor praying to be emancipated; or a married person praying to be declared single; or a testamentary executor praying to be judicially recognized as such; or a demented person, (through a friend,) praying to be adjudged a lunatic; or an insolvent, (after notice to creditors) praying to be adjudged a bankrupt, must be one over whom the court has jurisdiction.

It is not necessary that all those to be affected by the decree prayed for shall be brought into court.

In a divorce suit, the court having power to hear and determine with respect to the *status* of the applicant, it follows that the unsummoned party to the marriage, (though not a party to the suit for want of summons,) is necessarily affected by the decree granting divorce. He is necessarily though incidentally affected, if the form of the decree is with reference only to the applicant's *status*, instead of being a judgment against himself, as the form always is. But such incidental result is equivalent to a valid personal judgment against himself, because the decree fixing his wife's *status* is rendered by a court having jurisdiction with respect to it, and is therefore binding everywhere. That is the theory: not universally admitted, however.

It will be seen, therefore, that divorce suits against non-residents when considered in their true legal character, and not in their form, are not analogous to personal suits against unserved and non-appearing non-resident debtors whose property is not attached. The want of analogy is not because the latter proceeding is personal and the former *in rem*, as some suppose. Suits or applications to fix the *status* of a person are not *in rem*. The circumstance that the decrees thereunder are universally binding, and not liable to be attacked collaterally, does not justify their classification with proceedings against things. They have that circumstance in common with actions *in rem* with general notice, but they are wanting in other essentials to entitle them to such classification. There may be no *thing* involved. *Status* is not a thing. Property may or may not be in question, but the proceeding is not, by legal fiction, against *it* as an impleaded defendant. The want of analogy is plain: an application to fix the *status* of the applicant need not have a defendant in court while a personal suit against a debtor necessarily must. Though a judgment is valid against the property, and must have credit as such in other States, it is invalid as a personal judgment against a merely notified debtor and cannot be enforced against him by execution against other property of his, and cannot be successfully sued upon in another State for the excess beyond what the attached property has satisfied of

the debt. And the reason is that the court rendering such judgment has jurisdiction over the property but none over its owner;[1] that such proceeding is *in rem* and not *in personam*, though of the latter form.[2]

It may be urged, by way of excusing statutes authorizing personal suits upon publication only, that such suits stand upon equal footing with those in which the claim exceeds the value of the property attached, so far as concerns the excess. In other words, if a court may exercise jurisdiction after publication, when the demand is for a thousand dollars while the property attached is worth but half the sum, though the judgment is inoperative beyond what may be made out of the property, why may not a court be authorized to proceed upon publication notice without any preliminary seizure, leaving the plaintiff to find property for execution, taking the risk of having his judgment prove fruitless and inoperative? It is true that a judgment in an attachment suit is null and void, beyond the value of the property attached, where there is no personal defendant; and it is true that, beyond that point, it stands on no better footing than a personal judgment nominally against a non-resident merely notified by publication; but the difference, so far as concerns the question of jurisdiction, is that the court has whereon to act in the first case, to the extent of the seized property's value; while, in the second, it has not. The value of the attached property is not definitely known till the sale. There is usually an appraisement, but the plaintiff has the right of making all his debt out of it if he can. His demand governs, when it is necessary to decide whether the suit is for an amount sufficient to give the court jurisdiction, if there is a monied *maximum* or *minimum* limit to the jurisdiction. The appraisement does not govern this. Difficulties arise from this circumstance, but no better criterion suggests itself. Where the demand is for a thousand dollars, may the court take jurisdiction, though that sum be its *minimum*

[1] Bissell *v.* Briggs, 9 Mass. 462; Clymore *v.* Williams, 77 Ill. 618; Coleman's Appeal, 75 Pa. St. 441.

[2] Kilbourn *v.* Woodworth, 5 Johns. (N. Y.) 37; Borden *v.* Fitch, 15 Id. 121; Harris *v.* Hardeman, 14 How. 334, and cases cited *ante* chap. I, § 5.

limit, and the appraised value of the *res* only half that sum? When it has been demonstrated by sale, after judgment, that the property was worth less than the sum entitling a party to sue, while the demand was sufficient, must the proceeding be deemed a nullity? When nothing sufficient is seized and nobody summoned, it is certain from the first that there can be no jurisdiction. It is as if no property is attached: so there can be no judgment against an unserved and non-appearing non-resident.[1] Should a judgment be rendered under such circumstances, it would be an absolute nullity, to be disregarded everywhere; and the so-called defendant might impeach it collaterally, having been no party to the proceedings.[2] Even if notice to an absent debtor is not an express statutory requirement, there can be no valid judgment against him, if he does not appear, is not served, and nothing is attached.[3] If the record does not show jurisdiction over the debtor as a party defendant, or over his property by attachment and compliance with all statutory requisites, there can be no valid judgment.[4] But if the property or credits of the defendant have been attached in the hands of a third person, it has been held that jurisdiction over the garnishee gives jurisdiction over the attachment, though the defendant live in another county.[5] There should be notice to the defendant, however.

(2.) The debtor is not brought into court as a party by the attachment of his property, nor by both attachment of it and publication notice.

The usage formerly prevailed in England, and somewhat in the New England States, and occasionally in some others, of

[1] Eaton *v.* Badger, 33 N. H. 228; Pennoyer *v.* Neff, 95 U. S. 731.

[2] Webster *v.* Reid, 11 How. 437; Downs *v.* Fuller, 2 Met. 135; Leonard *v.* Bryant, 11 Met. 371.

[3] Carleton *v.* Washington Ins. Co. 35 N. H. 162, 168.

[4] Johnson *v.* Johnson *et al.* 26 Ind. 441.

[5] Smith *v.* Mulhern, 57 Miss. 591; Barnett *v.* Ring, 55 Miss. 97, and distinguishing Cain *v.* Simpson, 53 Miss. 521. But in Walker *v.* Cottrell, 6 Bax. 257, it was held that ancillary attachment is not leading process and "cannot be made the instrument by which the court acquires jurisdiction of the person of the defendant." If, however, notice to defendant should follow, what would be wanting to jurisdiction over the property, if statutory prerequisites have been observed?

attaching an article of the defendant's property however small, even a chip, for the purpose of bringing himself into court through his property. He was deemed to be personally in court for all purposes when some insignificant article was attached. The proceeding thereafter went on, not against such article, but as a personal suit.

This usage has not entered into the practice under any of the present existing statutory authorizations of the several States. Those who think the defendant is reached by the attachment of property supposed to be sufficient in value to satisfy the creditor's claim, have really no better reason for their theory than had the advocates of the antiquated usage above mentioned. Sometimes we still see the doctrine advanced that the defendant is brought into court by the bringing in of his property; and, wherever this crops out in an opinion it is almost always attributable to the old usage.

Such a proceeding by nominal attachment is not a personal suit in effect;[1] and the mere nominal attachment of an insignificant article can give no personal jurisdiction.[2]

The reader will encounter several decisions in which it is said that publication notice following the attachment of property is a substitute for service, and that it brings the defendant personally into court; but he will notice that nearly

[1] "Where, under the laws of some of the States, an attachment is the first process, and that being levied on any article of property, however small, gives jurisdiction to the court, a judgment is obtained, it is only considered as a proceeding *in rem*. * * Such a proceeding binds the property attached; but beyond that the defendant is not bound." Westerwelt *v.* Lewis & Tooker, 2 McLean, 511, 514. It would not bind the property attached as the *res*, without notification of some sort to its owner. "The proceeding by attachment is in derogation of the common law, and in the nature of a proceeding *in rem*," and plaintiff can recover only the amount set forth in his affidavit, with interest and costs, if the defendant is not served and does not appear, and the judgment can be satisfied only out of the property attached. Rowley *v.* Berrian, 12 Ill. 198, 202, citing Henrie *v.* Sweazy, 5 Blackford, (Ill.) 273. Reaffirmed in Hobson *v.* Emporium Real Estate and Manuf. Co. 42 Ill. 306.

[2] "The nominal attachment of a chip, a stick or a hat" not sufficient to authorize the court to render a valid judgment against an absent debtor notified by publication. Carleton *v.* Washington Ins. Co. 35 N. H. 162, 168.

all of such decisions further say that in cases of published notification there can be no personal judgments and that the decrees must be confined to the property attached:[1] thus the antidote accompanies the poison.

Why must the decrees be confined to the property attached? Why must a plaintiff, whose suit is personal in form, and who has established a credit due him in a sum quadruple that of the value of the property attached, be limited to the execution of that particular thing? Why may he not, after vindicating his lien upon the *res* by the sale, proceed to execute other property

[1] In illustration, take King *v.* Vance, 46 Ind. 246, which has often been cited, without challenge, to sustain the position that publication brings the attachment debtor into court. There is a single sentence in that decision, (introduced by way of argument in the discussion of the point whether the payee of a note may be garnished before the note is due,) in which the court said: "Where the defendant in attachment is a foreign corporation or a non-resident of the State, he may be brought in by publication; and when thus notified, a defendant is before the court for all purposes except the rendition of a personal judgment." The exception completely neutralizes the proposition; for if no personal judgment can be rendered, for what possible purpose can the defendant be personally in court? And if in court, what reason can be imagined why judgment may not be rendered against him, as a party, on evidence sufficient? The *ipse dixit*, (more prominent in the syllabus than in the text,) is unsupported by any citation of authority. Perhaps no one more than its author has been surprised at the large figure it has made as an *authority* to show that publication brings an attachment defendant into court for all purposes—the exception being frequently left out of sight. The court confined the remark to foreign attachments, yet it has been indiscriminately applied to attachments in general. Another illustration may be found in Bruce *v.* Stewart, 3 Wis. 773, 777. The lower court had dismissed the attachment because the publication made was deemed insufficient to confer jurisdiction. The Supreme Court said that the object of the publication as required by the statute, "is not to give the court jurisdiction of the writ and subject matter of the suit, but to inform the defendant, if possible, that proceedings have been taken against him, and give him an opportunity to defend." The implication that there would have been jurisdiction over the attached property without publication, is cured by the concluding statement that the object of the notice was to inform the defendant and afford him opportunity to defend; for it cannot be conceived that a just judge could condemn property absolutely (not merely *nisi*, etc.,) without such opportunity being afforded. Later, the court added that the defendant subsequently made personal appearance, "was in court, and jurisdiction was *thereby* acquired of his person."

of the defendant to make the other three-fourths of his claim? Manifestly because he has no judgment good against the unsummoned and non-appearing defendant, but only against the thing attached and incidentally against its owner to the amount of its value. The courts virtually say that the defendant is not brought personally into court by seizure and publication when they express the equivalent idea that the judgment is only good against the attached property.[1]

It has been held that a non-resident may appear specially by attorney and move to strike out a judgment rendered in an ancillary proceeding and to quash execution, without being within the jurisdiction of the court in respect to the action of assumpsit brought at the same time against him personally, wherein a summons was issued and returned *non est*.[2] He has been allowed to appear as *amicus curiæ* and successfully move that an attachment against his property be dissolved and the case dismissed.[3]

Sec. 3. Jurisdiction Over the Debtor's Property.

The lawful seizure and continued detention of the debtor's property are essential to jurisdiction over it. It may be held

[1] Maxwell *v.* Stewart, 22 Wall. 77; Casey *v.* Adams, 102 U. S. 66; Harris *v.* Hardeman, 14 How. 334; Force *v.* Gower, 23 How. Pr. 294; People *v.* Baker, 76 N. Y. 87; Robinson *v.* National Bank, 81 N. Y. 391; McKinney *v.* Collins, 88 N. Y. 216; Fitzsimmons *v.* Marks, 66 Barb. 333; Kilburn *v.* Woodworth, 5 Johns. 37; Borden *v.* Fitch, 15 Id. 121; Downer *v.* Shaw, 2 Fos. 277; Wilkie *v.* Jones, 1 Morr. (Iowa,) 97; Coleman's Appeal, 75 Pa. St. 441; Phelps *v.* Holker, 1 Dall. Pa. 261; Fitch *v.* Ross, 4 Serg. & R. 557; Miller *v.* Dungan, 36 N. J. L. 21; Bower *v.* Town, 12 Mich. 233; Clymore *v.* Williams, 77 Ill. 618; Hobson *v.* Emporium Real Estate and Manufacturing Co. 42 Ill. 306; Rowley *v.* Berrian, 12 Ill. 198, 202; Henry *v.* Sweazy, 5 Blatchf. 273; Massey *v.* Scott, 49 Mo. 278; Chamberlain *v.* Faris, 1 Mo. 517; Myers *v.* Farrell, 47 Miss. 281; Bates *v.* Crow, 57 Miss. 676, 678; Lincoln *v.* Tower, 2 McLean, 473; Westerwelt *v.* Lewis & Tooker, Id. 511, 514; Pancoast *v.* Washington, 5 Cr. (C. C.) 507; Fisher *v.* Lane, 3 Wils. 297; Shirley *v.* Byrnes, 34 Tex. 625; Green *v.* Hill, 4 Id. 465; Myers *v.* Smith, 29 Ohio St. 125; Egan *v.* Lumsden, 2 Dis. (O.) 168.

[2] Potomac Steam Boat Co. *v.* Clyde, 51 Md. 174. See Harris *v.* Hardeman, 14 How. 343.

[3] *Ex parte* Railroad Co. 103 U. S. 794; Des Moines and Minn. R. R. Co. *v.* Alley, (same case,) Id. See Nazoo *v.* Cragin, 3 Dill. 474; Toland *v.* Sprague, 12 Pet. 300; Dormitzer *v.* Ill. & St. Louis Bridge Co. 11 Law Reporter, 672.

by the defendant under a forthcoming bond; it may be entrusted to others, under such bond, pursuant to statutory authorizations, but the court's control and legal possession must be maintained till judgment, or the lien will fall, and the suit be ended so far as concerns the attachment.

If, before judgment, the attached property should be destroyed by fire or otherwise, lost, wasted, stolen, delivered unconditionally to the defendant, to a claimant or to a stranger; should be taken irrecoverably out of the jurisdiction, or should be, in any way, put beyond the legal possession and control of the court, so that it could not be subjected to execution after judgment, the whole purpose of the plaintiff in attaching would be defeated.

Nothing is better settled than that the possession actual or constructive, must be maintained, and the court's control of it preserved; and that this is essential to the attachment lien and the jurisdiction over attached property.[1]

If any apology be necessary for proceeding now to show that seizure does not obviate the necessity for notice, perhaps it may be found in the fact that there are those who hold the affirmative.

Seizure and detention of the debtor's property are not presumptive notice to him, under the attachment laws.

[1] Boynton *v.* Warren, 99 Mass. 172; Baldwin *v.* Jackson, 12 Id. 131; Cutler *v.* Howe, 122 Id. 541; Davis *v.* Stone, 120 Id. 283; Hemmenway *v.* Wheeler, 14 Pick. 408; Walkins *v.* Cawthorn, 33 La. Ann. 1194; Scott *v.* Davis, 26 La. Ann. 688; Nelson *v.* Simpson, 9 La. Ann. 311; Butler *v.* White, 25 Minn. 432; Wall *v.* Pulliam, 5 Heisk. 365; Ferguson *v.* Vance, 3 Lea, (Tenn.) 90; Roberts *v.* Dunn, 71 Ill. 46; Roberts *v.* Carpenter, 53 Vt. 678; Flanagan *v.* Wood, 33 Vt. 332; Montpelier & Wells River R. R. Co. *v.* Coffrin, 52 Vt. 17; Fitch *v.* Rogers, 7 Vt. 403; Charnock *v.* Colfax, 51 Iowa, 70; Waterhouse *v.* Smith, 22 Me. 337; Nichols *v.* Patton, 18 Id. 231; Lovejoy *v.* Hutchins, 23 Id. 272; Gower *v.* Stevens, 19 Id. 92; Chadbourne *v.* Sumner, 16 N. H. 129; Dunklee *v.* Fales, 5 Id. 527; Becker *v.* Bailies 44 Ct. 167; Taintor *v.* Williams, 7 Ct. 271; Sanford *v.* Boring, 12 Cal. 539; State *v.* Cornelius, 5 Oregon, 46. "It is a settled rule of the law of attachment, that in order to maintain the lien created by an attachment of personal property, the officer must, in some form, by himself or another, retain the custody of the property." Sanderson *v.* Edwards, 16 Pick. 144, citing Carrington *v.* Smith, 8 Id. 419. To the same effect: Bruce *v.* Holden, 21 Pick. 190; Bagley *v.* White, 4 Id. 395; Lane *v.* Jackson, 5 Mass. 157. The same rule holds as to the constructive possession of real property attached. *Ante*, p. 298.

It is true that, in actions *in rem* irrespective of persons: in suits upon forfeiture to fix the *status* of property so as to be conclusive upon all the world, it has been sometimes said that seizure is notice; notice to the owner who is presumed to know when his property is in the adverse possession of another[1]---and therefore to know when it is in the possession of the court and under the immediate custody of the seizing officer or of some keeper or bailee holding under him, for the court. But, even in such case, and certainly in suits *in rem* respective of persons, there should be notice by publication;[2] and it is the practice to give such notice, and the omission of it is not mere error; it is generally fatal to the jurisdiction, though there are exceptional cases, such as those of prize when the *res* has been captured in battle.

On this subject, Cooley says that notice is essential to the right to render judgment in proceedings *in rem*, of general character, binding upon all persons: "To render the jurisdiction of a court effectual in any case, it is necessary that the thing in controversy, or the parties interested, be subject to the process of the court. Certain cases are said to be *in rem*

[1] Bradstreet *v.* The Neptune Ins. Co. 3 Sumner, 609; Cross *v.* United States, 1 Gall. 28; Schooner Bolina, Id. 79; Hollingsworth *v.* Barbour, 4 Pet. 475; Boswell's Lessee *v.* Otis, 9 How. 336; Nations *v.* Johnson, 24 How. 205; Lane *v.* Shears, 1 Wend. 433; Scott *v.* Shearman, 2 Wm. Black. 977; Keating *v.* Spink, 3 Ohio St. 114; Thompson *v.* Steamboat Morton, 2 Id. 30; Stewart *v.* Board, *etc.* 25 Miss. 479; New Orleans, *etc.* *v.* Hemphill, 35 Id. 24.

[2] Gibbs *v.* Shaw, 17 Wis. 197; Pope *v.* Cutler, 34 Mich. 152; Gillett *v.* Needham, 37 Mich. 143; Sitzman *v.* Pacquette, 13 Wis. 291; Corwin *v.* Merritt, 3 Barb. 341; Sheldon *v.* Wright, 5 N. Y. 518; Ridgeney *v.* Coles, 6 Bosw. 486; Sibley *v.* Waffle, 16 N. Y. 185; Bloom *v.* Burdick, 1 Hill, 140; Clark *v.* Holmes, 1 Doug. (Mich.) 394; Palmer *v.* Oakley, 2 Id. 472; Greenvault *v.* F. & M. Bank, 2 Id. 498; French *v.* Hoyt, 6 N. H. 370; Dakin *v.* Hudson, 6 Cow. 222; Doe *v.* Anderson, 5 Ind. 34; Babbit *v.* Doe, 4 Ind. 356; Arnold *v.* Nye, 23 Mich. 292; Ryder *v.* Flanders, 30 Mich. 341; Bloom *v.* Burdick, 1 Hill, 137; Stark *v.* Brown, 12 Wis. 582; Sherry *v.* Dean, 8 Blatchf. 542; Givan *v.* McCarroll, 7 S. Dell. 351; Lessee of Adams *v.* Jeffries, 12 Ohio, 253; Warner *v.* Webster, 13 Id. 505; Messenger *v.* Klinter, 4 Bin. 97; Schneider *v.* McFarland, 2 Comst. 459; Bank *v.* Johnson, 7 S. & M. 449; Edwards *v.* Toomer, 14 Id. 75; Ridley *v.* Ridley, 24 Miss. 648; Calhoun *v.* Ware, 34 Id. 146; Martin *v.* Dryden, 6 Ill. 187; King *v.* Harrington, 14 Mich. 532; Clark *v.* Bryan, 16 Md. 171.

because they take notice rather of the thing in controversy than of the persons concerned; and the process is served upon that which is the object of the suit, without specially noticing the interested parties; while in other cases the parties themselves are brought before the court by process. Of the first class, admiralty proceedings are an illustration; the court acquiring jurisdiction by seizing the vessel or other thing to which the controversy relates. *In cases within this class, notice to all concerned is required to be given, either personally or by some species of publication or proclamation; and if not given, the court which had jurisdiction of the property will have none to enter judgment.*"[1]

It will be observed that the term "jurisdiction" is used in a limited sense when expressing the judicial power consequent from seizure, but in its full signification — power to hear and determine the cause — at the close where it is said that the court "will have none to enter judgment" unless notice has been given.

The class which includes those admiralty proceedings which are against things and conclusive of all persons, also includes proceedings at law against things seized upon land; and the same rule prevails. The statutes of the United States contain many authorizations, and the reports many illustrations, of proceedings at law of this character. Admiralty causes directly against property are not peculiar, as some who refer to them seem to assume; they belong to a class, as observed in the quotation above made. Many of the class are upon liens. That is, they are against things *indebted* by legal fiction. Notice is more apparently necessary in these than in suits for forfeiture.

It might be said that as an attachment proceeding is limited to the defendant—to the owner of the property attached, and does not extend to lien-holders and all others—the presumption that the owner knows when his property is seized will apply to him and render publication unnecessary; that the analogy between such a suit and proceedings upon forfeiture

[1] Cooley's Const. Limitations, 5th Ed., pp. 497, 498. The italics are not used in his text.

and the like, will hold good so far as the attachment debtor occupies a like position with the owner of forfeited property from whom it is taken. But the fact that the attachment suit is without *jus in re* and without any perfected *jus ad rem*, and is personal in form, and meant to be mainly so in effect to the end in judgment, destroys the analogy. The further fact that the legislator, in authorizing attachments, never contemplated that the presumptive knowledge arising upon seizure should supersede the necessity of summons or publication, (since the latter is positively required by statute when the former has failed,) precludes the assumption that a court can acquire complete authority to condemn property to pay, under the form of a personal judgment, upon the mere act of attaching.

Besides, could the analogy be invoked, it would go much farther than its friends seem to imagine. Those who hold, in proceedings *in rem* irrespective of persons, that seizure alone gives jurisdiction, (in the sense of authority to hear and determine the cause,) mean not only that seizure gives it without publication but without summons also. No summons is required in such cases, for no person is sued. Are the advocates of the analogy prepared to say that if the defendant of an attachment suit is present and accessible to ordinary process, the attaching of his goods obviates the necessity of summons? that the court can acquire jurisdiction, in this way, to try the cause?

Actions in vindication of existing liens, with general notice, such as admiralty suits in which the lien bearing property is libelled and impleaded, approach nearer to attachment suits than do those just considered. They are against things indebted, and aim to have the property not absolutely condemned but merely condemned to pay the debt; and, in these respects, they resemble attachment suits.

Though the attaching creditor proceeds against the debtor's interest in property, he is not a lien-holder before attaching it, nor is his lien complete after attaching and before judgment. In the suit on an admiralty lien, the owner of the lien-bearing property knows of the existence of the lien and of the liability

of that particular property to be seized for the purpose of its vindication. The attachment defendant, being an ordinary debtor cannot be presumed to know that a creditor will attempt to create a lien upon any of his property—much less can he be presumed to know on what particular property the creditor will attempt to create a lien. After the levy of the attachment, there is reason for the presumption that seizure imparts knowledge of seizure to him, but the proceeding is solely upon statutory authority which requires publication as well as seizure. Suits on admiralty liens are not statutory, and are in courts of general powers. There is, with regard to the lien, this remarkable difference: an admiralty libel against indebted property is to vindicate an existing lien, while an attachment proceeding is to create a lien; the former is "irrespective of persons" in the sense that it takes no note of particular ownership but is against the property seized and "all persons having or pretending to have any right, title or interest *in* or *to* the property seized therein," while the latter is confined to the debtor's interest as the *res* and is not against the right, title and interest of any other person—not against the property at all if it belongs to some other person than the debtor. The attachment suit, then, instead of being "irrespective of persons," is emphatically with respect to the debtor sued in the personal suit.[1]

The sale of perishable property, by order of court, before any

[1] In Walker *v.* Cottrell, 6 Bax. 257, the Supreme Court of Tennessee combats the position in Cooper *v.* Reynolds, 10 Wall. 308, (in which publication notice was thought to be not jurisdictional because the proceeding in the attachment suit under consideration had been *in rem*,) by trying to maintain that attachment suits are *in personam* in that State, when the debtor is notified only by publication. This untenable argument was uncalled for, since notice is necessary when the proceedings are *in rem*, as has been herein well established by the citation of authorities. See, on this subject, the next section, and the note on these two discordant decisions. In Micky *v.* Stratton, 5 Saw. 475, the court, trying to follow Cooper *v.* Reynolds, *supra*, and Pennoyer *v.* Neff, (95 U. S. 731,) and evidently mistaking the latter, said: "By a valid attachment of property within its jurisdiction, a State court acquires jurisdiction to give judgment that an absent defendant, *not otherwise served with process* in the proceeding, is indebted to the plaintiff therein, and to enforce the payment of the same by the sale of such property."

condemnation of it, or before any merging of an attachment lien into a judgment lien, may be made without publication notice to an absent defendant. Such sale always rests upon necessity for its justification. Ordinarily there is no necessity for such haste that there must be sale after attachment and before publication; but, admitting the necessity in any case, the want of notice to the owner would not render invalid the title acquired by the purchaser at the sale. But this forms no exception to the general rule that publication is essential to the validity of a judgment in an attachment suit against the property of a non-resident not served with process. It is not an exceptional judgment divesting the owner of his rights, for he owns the proceeds after his perishable property has been converted into cash. The thing sold would have perished had it not been sold. The purchaser has obtained the title which the former owner had, but not by virtue of an attachment judgment against the property.[1]

It has been thought that when property has been attached and brought into court but the debtor owner not reached, the court has jurisdiction over it irrespective of the owner because there is power to order its sale if it is perishable. It is needless to say that the court's right to sell is for the preservation of the property by changing it from its perishable condition to money which remains in custody as its substitute.[2] There is no hearing and determining the question of the validity of the plaintiff's claim, nor of the liability of the property attached. There is no exercise of jurisdiction in the sense in which jurisdiction is exercised when there is final judgment in the case.[3]

[1] In Megee *v.* Beirne, 39 Pa. St. 50, 62, it is said that such order and sale of perishable property is a proceeding *in rem*, and that the purchaser takes title against all persons, etc. It is a mere order for the sale of property—there is no condemnation of it. Notice is necessary in any proceeding *in rem* leading to a valid decree of condemnation, whether of forfeiture or of lien-vindication. This case does not teach that there may be condemnation without notice.

[2] Should the defendant subsequently appear and gain his suit, he would certainly be entitled to the proceeds of his property sold as perishable under an interlocutory order. Cross *v.* Elliott, 69 Me. 387.

[3] Oeters *v.* Aehle, 31 Mo. 380; *Ante*, p. 295.

It is usually from the final judgment that the purchaser derives the title which he has to defend against collateral attacks. It is clear that it is essential to his title that the court should have had jurisdiction to hear and determine the issue made between the plaintiff and defendant, or to pronounce default and confirm it in the absence of issue, after due summons or notice to the defendant. The case of the purchaser at a sale of perishable property, ordered to market *pendente lite*, is not under discussion. His title rests on very different principles from those above suggested.

The assertion frequently made, that jurisdiction over the property of a non-resident is acquired by attachment whether publication follows or not, must be understood in a qualified sense. In States where attachment suits against non-residents are allowed to proceed to judgment *nisi*, when there has been no publication, it is necessary to exact of the attaching creditor a bond by which he obligates himself to refund whatever he may acquire by the sale of the property, should the absent owner appear and set aside the judgment within a year. And the execution of such bond is made an indispensable preliminary to any proceeding against the attached property after such judgment. This shows plainly enough that the jurisdiction of the court is not such as to enable it to render final judgment by virtue of attachment alone, without notice.[1]

In all attachment suits, it is absolutely essential to jurisdiction in the sense of the court's authority to hear and *finally*

[1] Walters *v.* Monroe, 17 Md. 505, (in which there is a copy of such an attachment judgment *nisi*;) Campbell *v.* Robert Morris, 3 Harris & McHenry, (Md) 553; Potomac Steamboat Co. *v.* Clyde, 51 Md 174; Harris *v.* Hardeman, 14 How. 343; Hiller *v.* Lampkin, 54 Miss. 14, (in exposition of Code of 1871, § 1479,) in case of default, even though there has been publication notice, bond is required; Anderson *v.* Johnson, 32 Gratt. 558, in which it is held that a non-resident may appear after judgment and have the case reheard, etc. Beech *v.* Abbott, 6 Vt. 586, 592, was a case of foreign attachment, based on a statute authorizing proceedings similar to those under the custom of London, and partaking of the character of the old distraint laws. Some "speckled cattle" had been attached or distrained to "compel appearance" on the part of the alleged debtor. There was judgment *nisi*, and the attaching creditor was required to give bond before sale. Under these circumstances, the court, rightfully

determine the cause against the property, that the defendant either be summoned or notified by publication, when he does not appear. It is universally conceded to be so, when the statute positively requires it. It is so, too, when the requirement is not positively expressed but is implied. It is so, also, even though the statute itself is silent on the subject.

That this is imperative, appears on consideration of the general principle that every one to be affected directly by the judgment must be afforded an opportunity to be heard; must be offered his day in court; must be allowed full privilege and time to defend his property, which implies previous notice of the hearing. It also appears in consideration of the peculiar nature of the attachment proceeding. It is nominally against the debtor, though in effect against his property in case he is not summoned and does not respond to notice; but the law favors the personal feature of the suit, and requires that an opportunity be given for the defendant to preserve its personal character to the end. He is invited to come, not as a mere claimant of the property as in proceedings upon forfeiture and the like, but as the defendant to the action—as one personally sued.

Courts cannot rightfully exercise jurisdiction *if they possess it*, without publication notice, where there is no summons served and no appearance.[1] This rule applies to all courts, whether of limited or general jurisdiction. Procedure to judgment without notice, under such circumstances, is error

or wrongfully, deemed prior notice to the debtor a non-essential. Strangely enough, this case has long been cited to sustain the untenable position that notice is not jurisdictional in attachment suits in which there is final judgment.

[1] Potomac Steamboat Co. *v.* Clyde, 51 Md. 174; Harris *v.* Hardeman, 14 How 343; *Ex parte* Railroad Co. 103 U. S. 794; Edwards *v.* Toomer, 22 Miss. 75; Ridley *v.* Ridley, 24 Miss. 648; Calhoun *v.* Ware, 34 Id. 146; Martin *v.* Dryden, 6 Ill. 187; Williams *v.* Stewart, 3 Wis. 773; Massey *v.* Scott, 49 Mo. 278; King *v.* Harrington, 14 Mich. 532; Cooper *v.* Reynolds, 10 Wall. 308, 319: If there is no publication, or no publication properly made, in substantial compliance with statutory requirement, a court of errors may reverse a judgment rendered without it. (See note, *post*, with reference to want of notice in case of collateral attack, in which this case seems to say that publication is not jurisdictional.)

for which the decree in favor of the attaching creditor may be reversed on appeal. This doctrine is well established and universally conceded. The reversal may be had, in such case, whether notice was essential to jurisdiction or not; for, when jurisdiction has vested, error in its exercise is fatal on appeal. Omission to give notice upon default of summons is in violation of a requirement common to the statutes authorizing attachment, and obligatory upon superior as well as inferior courts. Such omission, or even an insufficient compliance with this statutory requirement, renders the judgment voidable.[1] And the appellate court will look to the record to ascertain whether the required notice was given and whether it was sufficient. However, since the hypothesis is unfounded, such judgments are absolutely void.

Sec. 4. Statutory Requisites Jurisdictional.

It is settled that all the statutory pre-requisites to attachmeet are jurisdictional; that they are not to be presumed after judgment jurisdictionless for want of them; and that such judgment may be collaterally attacked.[2]

[1] Id.

[2] Clark *v.* Thompson, 47 Ill. 26; Schnell *v.* City of Chicago, 38 Id. 383; Morris *v.* Hogle, 37 Id. 150; Cariker *v.* Anderson, 27 Id. 358; Rowley *v.* Berrian, 12 Id. 198; Vairin *v.* Edmonson, 5 Gilman, 270; Lawrence *v.* Yeatman, 2 Scam. 15; Haywood *v.* Collins, 60 Ill. 328; Haywood *v.* McCrory, 33 Id. 459; Borders *v.* Murphy, 78 Id. 81; Clymore *v.* Williams, 77 Id. 618; Roberts *v.* Dunn, 71 Id. 46; Henrie *v.* Sweazy, 5 Blackf. 273; Hobson *v.* Emporium Real Estate and Manuf. Co. 42 Ill. 306; Martin *v.* Dryden, 6 Id. 187; Johnson *v.* Johnson, 26 Ind. 441; Mitchell's Admr. *v.* Gray, 18 Id. 123; Millar *v.* Babcock, 29 Mich. 526; King *v.* Harrington, 14 Id. 532; Buckley *v.* Lowry, 2 Mich. 418; Roelofson *v.* Hatch, 3 Id. 277; Bower *v.* Town, 12 Mich. 233; Van Norman *v.* Jackson Circuit Judge, 45 Mich. 204; Gay *v.* Eaton, 27 La. Ann. 166; Scott *v.* Davis, 26 Id. 688; Nelson *v.* Simpson, 9 Id. 311; Newman *v.* Kraim, 34 La. Ann. 910; Hemshein *v.* Levy, 32 Id. 340; Walker *v.* Barrelli, Id. 467; Walker *v.* Day, Griswold & Co. 8 Bax. 77; Walker *v.* Cottrell, 6 Bax. 257; Wall *v.* Pulliam, 5 Heisk. 365; Ferguson *v.* Vance, 3 Lea, 90; Grubbs *v.* Colter, 7 Bax. 432; Bivens *v.* Matthews, 7 Id. 256; Wilson *v.* Beadle, 39 Tenn. 510; Pa. Steel Co. *v.* N. J. Southern R. R. Co. 4 Houston, (Del.) 572; Clark *v.* Bryan, 16 Md. 171; Potomac Steamboat Co. *v.* Clyde, 51 Md. 174; Smith *v.* Easton, 54 Md. 138; Marx *v.* Abraham, 53 Tex. 264; Bruhn *v.* Jefferson Bank, 54 Tex. 152; Ward *v.* Mc-

It is begging the question to say that seizure gives jurisdiction so as to render affidavit, bond, etc., presumable after decree, when they are statutory pre-requisites to seizure, and therefore to jurisdiction. It cannot be assumed that seizure has given jurisdiction, when the real question is whether there has been any authority to seize or to proceed in the attachment case at all without compliance with statutory requirements on the part of the attaching creditor. Such presumption has been indulged when the attachment defendant had been served and brought personally into court. No doubt service gave jurisdiction of the

Kenzie, 33 Id. 297; Shirley *v.* Byrnes, 34 Id. 625; Green *v.* Hill, 4 Id. 465; Whittenberg *v.* Lloyd, 49 Id. 633; Anderson *v.* Coburn, 27 Wis. 558; Williams *v.* Stewart, 3 Id. 773; Warner *v.* Webster, 13 Ohio, 505; Myers *v.* Smith, 29 Ohio St. 125; Egan *v.* Lumsden, 2 Dis. (O.) 168; Wescott *v.* Archer, 12 Neb. 345; Marsh *v.* Steele, 9 Neb. 96; Hilton *v.* Ross, 9 Neb. 406; Spiegelberg *v.* Sullivan, 1 New Mexico, 575; Phillips *v.* Welch, 11 Nev. 187; Moresi *v.* Swift, 15 Nev. 215; Levy *v.* Elliott, 14 Id. 435; Crieghton *v.* Kerr, 1 Cal. 509; People *v.* Baker, 76 N. Y. 87; Robinson *v.* Nat. Bank, 81 Id. 391; McKinney *v.* Collins, 88 Id. 216; Phelps *v.* Baker, 60 Barb. 107; Fitzsimmons *v.* Marks, 66 Id. 333; Bogart *v.* Swezey, 26 Hun. 463; Kilbourn *v.* Woodworth, 5 Johns. 37; Borden *v.* Fitch, 15 Id. 121; Force *v.* Gower, 23 How. Pr. 294; Zeregal *v.* Benoist, 33 Id. 129; Lampkin *v.* Douglass, 27 Hun. 517; Bennett *v.* Edwards, Id. 352; (but see Carr *v.* Van Hoeson, 26 Id. 316;) Bissell *v.* Briggs, 9 Mass. 462; Downs *v.* Fuller, 2 Met. 135; Leonard *v.* Bryant, 11 Id. 371; Boynton *v.* Warren, 99 Mass. 172; Cutter *v.* Howe, 122 Id. 541; Davis *v.* Stone, 120 Id. 288; Bruce *v.* Cloutman, 45 N. H. 37; Carleton *v.* Wash. Ins. Co. 35 Id. 162; Eaton *v.* Badger, 33 Id. 228; Chadbourne *v.* Sumner, 16 Id. 129; Dunklee *v.* Fales, 5 Id. 527; Downer *v.* Shaw, 2 Fos. 277; Becker *v.* Bailies, 44 Ct. 167; Taintor *v.* Williams, 7 Ct. 271; Roberts *v.* Carpenter, 53 Vt. 678; Flanagan *v.* Wood, 33 Id. 332; Montpelier & Wells River R. R. Co. *v.* Coffrin, 52 Id. 17; Fitch *v.* Rogers, 7 Id. 403; Coleman's Appeal, 75 Pa. St. 441; Phelps *v.* Holker, 1 Dall. (Pa.) 261; Fitch *v.* Ross, 4 S. & R. 557 Waterhouse *v.* Smith, 22 Me. 337; Nichols *v.* Patton, 18 Id. 231; Lovejoy *v.* Hutchins, 23 Id. 272; Gower *v.* Stevens, 19 Id. 92; (but see Mitchell *v.* Sutherland, 74 Me. 100;) Miller *v.* Dungan, 36 N. J. L. 21; Judah *v.* Stephenson, 10 Iowa, 493; Cooper *v.* Smith, 25 Id. 269; Morris *v.* Union Pacific R. R. Co. 56 Id. 135; Wilkie *v.* Jones, 1 Morr. (Iowa,) 97; Charnock *v.* Colfax, 51 Iowa, 70; Darrance *v.* Preston, 18 Id. 396; Hakes *v.* Shupe, 27 Id. 465; Repine *v.* McPherson, 2 Kan. 340; Keith *v.* Stetter, 25 Kan. 100; Beckwith *v.* Douglas, 25 Kan. 229; Race *v.* Maloney, 21 Id. 31; Bundrem *v.* Denn, 25 Id. 430; Butler *v.* White, 25 Minn. 432; Hines *v.* Chambers, 29 Id. 7; Hoffner *v.* Gunz, Id. 108; Auerbach *v.* Hitchcock, 28 Id. 73; Abbott *v.* Sheppard, 44 Mo. 273; Smith *v.* McCutchen, 38 Id. 415; Massey *v.* Scott, 49 Mo. 278; Chamberlain *v.* Faris, 1 Id. 517;

personal action: but how could it give it in the ancillary proceeding? How could that enable the creditor to acquire a lien upon unincumbered property before judgment? How could that dispense with the statutory essentials of an attachment? How could the execution of a writ of summons render a writ of attachment valid without an affidavit such as the statute rendered indispensable?

If jurisdiction over the person of the defendant in an action for debt renders whatever is necessary to the exercise of it presumable after decree, (as it unquestionably does so far as the personal action is concerned, in a court of general jurisdiction,) does it follow that the plaintiff may sue out an attachment in such case and neglect the affidavit with impunity? that he can have his ancillary attachment suit without compliance with the pre-requisites? that a writ, issued and executed without authority, is to be presumed authoritative because personal judgment has been rendered against the defendant? that competing attachers must respect the lien thus created and let it outrank theirs on the plea of priority? that assignment before judgment must be set aside on the plea that seizure has been perfected by the personal judgment, or even by a judgment in the ancillary proceeding in which the statutory requisites to jurisdiction had been disregarded?

Instead of assuming that seizure, right or wrong, gives jurisdiction over property and creates a lien, the first step is to

Oeters *v.* Aehle, 31 Mo. 380; Clark *v.* Brott, 71 Mo. 473; Miller *v.* Sharp, 3 Randolph, (Va.) 41; Hopkirk *v.* Bridges, 4 Hen. & M. 413; Faulk *v.* Smith, 84 N. C. 501; Devries *v.* Summit, 86 N. C. 126; Metts *v.* Ins. Co. 17 S. C. 120; Claussen *v.* Fultz, 13 S. C. 476; Austin *v.* Bodley, 4 Mon. (Ky.) 434; Maude *v.* Rhodes, 4 Dana, (Ky.) 144; Hunt *v.* Johnson, Freeman, (Miss.) 282; Myers *v.* Farrell, 47 Miss. 281; Bates *v.* Crow, 57 Id. 676; Edwards *v.* Toomer, 22 Id. 75; Ridley *v.* Ridley, 24 Id. 648; Calhoun *v.* Ware, 34 Id. 146; Sanford *v.* Boring, 12 Cal. 539; Wilkie *v.* Cohn, 54 Cal. 212; Merced Bank *v.* Morton, 58 Id. 360; State *v.* Cornelius, 5 Oregon, 46, Dow *v.* Whitman, 36 Ala. 604, Wright *v.* Smith, 66 Ala. 545; Johnson *v.* Hanna, Id. 127; Flexner & Lichten *v.* Dickerson, 65 Ala. 1.9; Russell *v.* Gregory, 62 Ala. 454; Waxelbaum *v.* Paschal, 64 Ga. 275; Harralson *v.* Newton, 63 Ga. 163; Neal *v.* Gordon, 60 Id. 112; Rodega *v.* Perkerson, Id. 516; Grangers' Ins. Co. *v.* Turner, 61 Id. 561; Buchanan *v.* Sterling, 63 Ga. 227, and very many other cases. There are some to the contrary—Paine *v.* Mooreland, 15 Ohio, 435, and its following

inquire into the right to seize, whether the debtor be in court or not. That right comes from the statute or not at all, in an attachment case. If it is authorized by the law-maker only when ordinary process is inadequate, and when certain conditions or states of facts are shown by the oath of the creditor to be in existence, it is impossible that a court can have power to issue the writ to seize under any other circumstances. If the writ is issued without authorization, there is usurpation of authority. If it is executed, the execution cannot possibly validate the illegal issue by giving, to the usurper, jurisdiction of such retroactive character as to cure all that went before it and contributed to the wrongful result.

Whatever the statute makes essential to the movement of the court is necessarily jurisdictional. No court could entertain an attachment suit were all attachment laws repealed. No court could entertain one merely because of its general jurisdiction. Whatever conditions precedent the legislature imposes are indispensable to the lodgment of the authority to proceed in an attachment case.

It was assumed that jurisdiction had been already vested, in Voorhies *v.* Bank of the United States;[1] for there Mr. Justice Baldwin cited several cases which were not upon attachments but which turned upon principles of the common law, (Blaine *v.* The Charles Carter, 4 Cr. 328; Wheaton *v.* Sexton, 4 Wheat. 506; Talmie *v.* Thompson, 2 Pet. 157; Elliott *v.* Piersal, 1 Pet. 340; Taylor *v.* Thompson, 5 Pet. 370; United States *v.* Arredondo, 6 Pet. 729,) to prove that "when a court has jurisdiction, it has a right to decide every question that arises in the cause; and whether the decision be correct or not, its judgment until reversed is regarded as binding in every court." This is incontrovertible. With jurisdiction conceded, errors in its exercise are cured by judgment, whether the suit be one of attachment or one at common law. So in Grignon *v.* Astor,[2] which was a case not involving an attachment but a probate court judgment, the same justice assumed that jurisdiction had been vested, and therefore he held that the giving of publication

[1] 10 Pet. 449. [2] 2 How. 319.

notice was an act belonging to the exercise of jurisdiction, and might be presumed after the decree. So in Cooper *v.* Reynolds,[1] it was assumed that jurisdiction had been already vested, and that notice might be presumed after the decree.

Wherever the statute of a State renders publication a jurisdictional requisite, a judgment rendered without compliance with it in this respect is absolutely void, not only as to the defendant but as to a purchaser under such judgment and all other persons. Such judgment, being a nullity at the time of its rendition, cannot possibly be validated by a sale under it.[2]

Where attachment is levied on land of a non-resident and summons is not made on him, the court possesses no power to render judgment against him and order a sale of his property to satisfy it, unless publication has been made as required by law.[3] Whether the property be real or personal, the rule is the same.

Federal courts are bound to observe the statutes of the State, and they usually look to the construction by the highest court of the State, and follow it; but it is held that they are not bound to do so—the act of Congress not requiring it.[4] As a general rule, the Supreme Court of the United States,

[1] 10 Wall. 308.

[2] Anderson *v.* Coburn, 27 Wis. 558. Sec. 40 of the Code of Procedure, under which this decision was rendered, required that "in all cases where publication is made, the complaint shall be first filed, and the summons as published shall state the time and place of such filing;" and that the publication shall be made "not less than once a week for six weeks." The court said: "These things were made indispensable in order to give the court jurisdiction where service was made by publication. It is an elementary principle, that where jurisdiction is acquired by publication, the provisions of the statute regulating the mode of service must be strictly complied with. * * * We therefore think the judgment was void at the time of its rendition, on account of the omission to file the complaint before or when the publication of the summons commenced, as required by law. * * * There was no valid attachment because there was no proper publication of the summons upon which the validity of the attachment depended."

[3] Wescott *v.* Archer, 12 Neb. 345.

[4] Lehman *v.* Berdin, 5 Dillon, 340; Erstein *v.* Rothschild, 22 Fed. Rep. 61; U. S. Rev. Stat. § 915; Atlantic & Pac. R. R. Co. *v.* Hopkins, 94 U. S. 11; Carroll *v.* Smith, 111 U. S. 556, 563; Burgess *v.* Seligman, 107 U. S. 20, 33; County of Cass *v.* Johnston, 95 U. S. 360; St. Joseph Township *v.* Rogers, 16 Wall. 644; State *v.* Sutterfield, 54 Mo. 391.

deciding attachment suits brought up from any State, looks to its statutes and to the construction there made by its highest tribunal, for the governing law, since that is wholly statutory. Whether the question involved be the effect of publication upon jurisdiction, or any other, the national tribunal will look to the statutes and construction prevailing in the State whence the case has come.[1] Sometimes a case, in that court, turns wholly upon a proper understanding of the statutory law applicable to the attachment. If a mistake be made with respect to that, the decision would be shorn of its influence as authority, to prove that the non-observance of statutory requirements, by a State court, is only voidable error.[2]

In the U. S. Supreme Court case, last cited, notice of publication as required by statute in the absence of the service of summons and of the defendant's appearance, was deemed non-essen-

[1] U. S. Rev. Stat. Sec. 721. "The laws of the several States, except where the constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in courts of the United States, in cases where they apply." Brown *v.* Van Braam, 3 Dall. 344; Robinson *v.* Campbell, 3 Wh. 212; Cohens *v.* Virginia, 6 Wh. 264; Wayman *v.* Southard, 10 Wh. 1; Green *v.* Neal's Lessee, 6 Pet. 291; Ross *v.* Duval, 13 Pet. 45; Swift *v.* Tyson, 16 Pet. 1; Lane *v.* Vick, 3 How. 464; Luther *v.* Borden, 7 How. 1; Williamson *v.* Berry, 8 How. 495; Van Renselaer *v.* Kearney, 11 How. 297; U. S. *v.* Reid, 12 How. 361; Neves *v.* Scott, 13 How. 268; Carroll *v.* Carroll's Lessee, 16 How. 275; Morgan *v.* Curtenius, 20 How. 1; Fenn *v.* Holme, 21 How. 481; Jeter *v.* Hewitt, 22 How. 352; Suydam *v.* Williamson, 24 How. 328; Sheirburn *v.* Cordova, Id. 423; Haussnecht *v.* Claypool, 1 Bl. 603; Chicago *v.* Robbins, 2 Bl. 418; Leffingwell *v.* Warren, Id. 599; Bridge Proprietors *v.* Hoboken Com. 1 Wall. 145; Gelpcke *v.* Dubuque, Id. 175; Christy *v.* Pridgeon, 4 Wall. 203; Mitchell *v.* Burlington, Id. 274; Ewing *v.* City of St. Louis, 5 Wall. 419; Nichols *v.* Levy, Id. 433; Delmas *v.* Ins. Co. 14 Wall. 667; Boyce *v.* Tabb, 18 Wall. 546.

[2] In the case of Cooper *v.* Reynolds, 10 Wall. 308, there seems to have been a question with regard to the effect of publication upon jurisdiction according to the statute of Tennessee, whence the case had been brought. The majority of the judges thought that a purchaser at an attachment sale could successfully defend against a collateral attack, though no publication or no sufficient publication was shown by the record of the attachment suit. It was shown that the Tennessee Code required newspaper publication containing the names of the parties, style of the court, the cause of action, the time and place of the return, etc.; and § 3524 of that code, (1857–8) was as fol-

tial to the jurisdiction because the case was an attachment suit *in rem*. It is difficult to discover how that fact could authorize non-conformity to the statutes, since it is certainly in the power of every State to regulate its own process, and to prescribe the essentials of a proceeding against property as well as those of a proceeding against a person. Had there been no publication prescribed, to take the place of a personal summons, in legal effect, as to property; had the Code of Tennessee been silent on the subject, there would yet have been necessity for notice to any person who was to be bound by the decree; to all persons, if all were to be bound. A proceeding *in rem*, (whether one of general notice, to conclude all the world, or of limited notice, to conclude the one or more persons to whom it is addressed,) is of no avail when there is no notification at all, except in the limited instances in which notice is presumed. The necessity of notice, in all proceedings *in rem*, is as well founded upon principle as is that necessity when the cause is *in personam*.

In its strictures upon that case, the court of Tennessee (see the preceding note,) met the argument by denying that attachment proceedings are *in rem* in that State; asserting that they are *in personam* though the defendant be not served with summons and should not appear; that attach-

lows:. "The attachment and publication are in lieu of personal service upon the defendant, and the plaintiff may proceed upon the return of the attachment duly levied, as if the suit had been commenced by summons." The Supreme Court said, "It is of no avail to show that there are errors in the record, unless they be such as to prove that the court had no jurisdiction of the case." Reference was then made to several Tennessee cases, (as well as to U. S. cases,) and publication was held not jurisdictional in such sense that its omission would make the judgment absolutely void. There was a dissenting opinion which held that the State court of Tennessee never had acquired jurisdiction of the attachment suit. This dissenting opinion has been since strongly approved by the Supreme Court of Tennessee in the case of Walker *v.* Cottrell, 6 Bax. 257. It there said: "We may as well dispense with the levy as with the publication," referring to § 3524 avove quoted from the Tenn. Code. And then, on general principles: "It is contrary to the principle of justice to take, by judicial action, the property of a party and give it to another, without notice of a pending suit against him." * * * "If the defendant has no notice or its equivalent, the judgment is void."

ment there is ancillary and is not leading process. An attachment suit at law is necessarily *in personam* when it originates in a federal court, because the jurisdiction depends upon the residence of the parties as in any case at law therein, when not included in statutory exceptions; and attachment is always ancillary.[1] From this limitation it has been inferred that the nonobservance of the requirements of State statutes is mere error of procedure, in those courts, not affecting jurisdiction in the ancillary proceeding.[2] There must, however, be "similar affidavits and proofs and similar security, as required by the State law."[3] The State practice must be followed "as near as may be."[4] It is not a rule of procedure unless adopted by the federal courts. But State statutes are rules of decision governing rights and titles, litigated in those courts.

In a collateral attack upon an attachment judgment, the difference between insufficient notice by publication and an entire absence of notice, should be remarked, when they are presented as grounds for treating the attachment judgment as a nullity.[5] If the plaintiff in such collateral action relies alone upon the record to show that the publication in the attachment proceeding fell short of the statute requirement, he will have to encounter the presumption which favors the record;[6] but should he have the silence of the record with regard to notice,

[1] U. S. Rev. Stat. §§ 738–742, 915; *Ex parte* Railroad Co. 103 U. S. 794; Anderson *v.* Shaffer, 10 Fed. Rep. 266; Day *v.* Newark India Rubber Co. 1 Blatchf. 628; Allen *v.* Blunt, 1 Id. 480; Richmond *v.* Dreyfous, 1 Sumn. 131; Pequet *v.* Swan, 5 Mason, 35; Saddler *v.* Hudson, 2 Curt. C. C. 6; Toland *v.* Sprague, 12 Pet. 300; Levy *v.* Fitzpatrick, 15 Id. 171; Chittenden's Case, 2 Woods. 437; Clarke *v.* N. J. Steam Nav. Co. 1 Story, 531.

[2] Erstein *v.* Rothschild, 22 Fed. Rep. 61.

[3] U. S. Rev. Stat. § 915.

[4] Id. § 914; Indianapolis & St. Louis R. R. Co. *v.* Horst, 93 U. S. 291, 300; Nudd *v.* Burrows, 91 U. S. 426, 441.

[5] Gregg *v.* Thompson, 17 Iowa, 107: Here the court presumed the notice sufficient, in the absence of evidence disproving what appeared of record. It would seem that the judgment would have been held void, had there been no notice whatever.

[6] Boker *v.* Chapline, 12 Iowa, 204, where the return was, "Served the within notice by reading," *etc.*, without stating to whom: held that it must be presumed that the officer served it personally on defendant as required by the writ. Crowley *v.* Wallace, 12 Mo. 147: presumption

to rely upon, no presumption that notice was given could be invoked against him.

Sec. 5. The Court's Authority Special.

The general rule is that judgments of an inferior court in which it has exceeded its jurisdiction, are void; those of superior or general jurisdiction, only voidable;[1] but any court must have power to hear, and to determine the subject matter, before proceeding to exercise it at all.[2]

If the jurisdiction of a court of inferior or limited jurisdiction has once attached, its subsequent proceedings are presumed as regular as those of a court of general powers.[3] On the other hand, when courts of superior or general jurisdiction are exercising special statutory powers, their records are subject to the same rules as are those of inferior or limited jurisdiction.[4]

There is no presumption of the existence of jurisdictional facts arising from the exercise of jurisdiction by an inferior court;[5] nor is there any, arising from such exercise by a supe-

of the proper township when the officer had omitted to name it in his return of service. Bromley *v.* Smith, 2 Hill, 517: "Personally served" presumed to mean all that the statute required as to time and manner of service. These presumptions were in collateral attacks made on judgments sought to be set aside for insufficient service; and in each case there was evidence of notice, appearing by record. None of these cases hold that there is presumption of notice when the record makes no showing whatever of such jurisdictional fact.

[1] Kempe's Lessee *v.* Kennedy, 5 Cranch, 173; Thompson *v.* Tolmie, 2 Pet. 157.

[2] Beauregard *v.* New Orleans, 18 How. 502; Shriver's Lessee *v.* Lynn, 2 How. 43, 60; United States *v.* Arredondo, 6 Pet. 709: Voorhies *v.* Bank of the United States, 10 Pet. 474; State of Rhode Island *v.* State of Mass., 12 Pet. 718; Florentine *v.* Barton, 2 Wal. 216; Comstock *v.* Crawford, 3 Wal. 404; Callen *v.* Ellison, *et al.* 13 Ohio State, 452; Sheldon *v.* Newton, 3 Ohio State, 494; Shroyer *v.* Richmond, 16 Ohio State, 455; Wilder *v.* City of Chicago, 26 Ill. 182; Dequindre *v.* Williams, 31 Ind. 456; Smiley *v.* Samson, 1 Neb. 56; Mulford *v.* Stalzenback, 46 Ill. 307.

[3] Smith *v.* Engle, 44 Iowa, 265.

[4] Kansas City, St. Jo. & C. B. R. R. Co. *v.* Campbell, 62 Mo. 585.

[5] Petters *v.* McClannahan, 52 Ala. 55; Cunningham *v.* Pac. R. R. Co. 61 Mo. 33; State *v.* Gachenheimer, 30 Ind. 63; Ohio, *etc.* R. R. Co. *v.* Shultz, 31 Ind. 150; State *v.* Ely, 43 Ala. 568.

rior court, when acting pursuant to special authorization. A court, though one of superior jurisdiction, is subject to the rule governing courts of inferior jurisdiction, that nothing shall be intended to be within its powers but what is expressly alleged of record, when it is in the exercise of special statutory authority. And the validity of its judgment may be collaterally questioned if the record does not show all the required jurisdictional facts.[1]

The distinction between courts with reference to the presumption of jurisdictional facts after decree, is not that between inferior and superior, but between courts acting pursuant to statutory authorization and those exercising general powers.

Courts of special statutory jurisdiction, must not only act within its scope, but it must appear on the face of their proceedings that they so acted, or their proceedings are *coram non judice* and void.[2]

[1] Peacock *v.* Bell, 1 Saund. 69; Thatcher *v.* Powell, 6 Wheat. 119; Williamson *v.* Ball, 8 How. (U. S.) 566; Williamson *v.* Berry, Id. 495; Denning *v.* Corwin, 11 Wend. 648; Jackson *v.* Esty, 7 Id. 148; Bloom *v.* Burdick, 1 Hill, 130; Rogers *v.* Dill, 6 Id. 415; Dakin *v.* Hudson, 6 Cow. 221; Latham *v.* Edgerton, 9 Id. 227; Borden *v.* Fitch, 15 Johns. 121; Mills *v.* Martin, 19 Id. 7; Bigelow *v.* Stearns, Id. 39; Goudy *v.* Hall, 30 Ill. 109; White *v.* Jones, 38 Ill. 160; Miller *v.* Handy, 40 Ill. 448; Campbell *v.* McCahan, 41 Ill. 45; Whorton *v.* Morayne, 62 Ala. 201; Dynes *v.* Hoover, 20 How. 65, 80; Shriver *v.* Lynn, 2 How. 43; Elliott *v.* Piersol, 1 Pet. 328; Thompson *v.* Tolmie, 2 Pet. 157; Wilkinson *v.* Leland, 2 Pet. 627; Morris *v.* Hogle, 37 Ill. 150; Congar *v.* Galina, etc., 17 Wis. 477; Miller *v.* Handy, 40 Ill. 448; Clark *v.* Thompson, 47 Ill. 27; Haywood *v.* Collins, 60 Ill. 328; Osgood *v.* Blackmore, 59 Ill. 261; Morse *v.* Goold, 11 N. Y. 281; Jackson *v.* Babcock, 16 Id. 246; Gibson *v.* Roll, 30 Ill. 172; Johnson *v.* Johnson, Id. 215; Goudy *v.* Hall, Id. 109; Mason *v.* Messenger, 17 Iowa, 268; Grignon's Lessee *v* Astor, 2 How. 338.

[2] Ex parte R. R. Co. 103 U. S. 794; Walker *v.* Turner, 9 Wheat. 541; Kemp *v.* Kennedy, 5 Cr. 172; Turner *v.* Bank of America, 4 Dall. 11; Ransom *v.* Williams, 2 Wall. 313; Williamson *v.* Berry, 8 How. 495; Boswell *v.* Otis, 9 Id. 336; Eaton *v.* Badger, 33 N. H. 228; Gray *v.* McNeal, 12 Ga. 424; Williams *v.* Blunt, 2 Mass. 213; Hunt *v.* Hapgood, 4 Mass. 122, Albee *v.* Ward, 8 Mass. 86; Smith *v.* Rice, 11 Mass. 513; Hendrick *v.* Cleveland, 2 Vt. 329; Walbridge *v.* Hall, 3 Vt. 114; Clapp *v.* Beardsley, 1 Aik. (Vt.) 168; Hall *v.* Howd, 10 Ct. 514; Webster *v.* Parsons, Kirby, (Ct.) 27; Powers *v.* People, 4 Johns. 292; Latham *v.* Egerton, 9 Cow. 227; Bergen Turnpike Co. *v.* State, 25 N. J. L. 554; City of Chicago *v.* Rock Island R. R. Co. 20 Ill. 286; Martin *v.* Dryden, 6 Id. 187;

Attachment being a special, extraordinary, statute remedy, comes under the rule requiring jurisdictional facts to appear of record, including publication notice, when that is a jurisdictional fact.[1]

When a court of general jurisdiction has exercised general authority to hear and determine, it may be presumed to have had jurisdiction when its authority is collaterally questioned.[2] It has been held that, after such court has acquired jurisdiction of the parties and of the subject-matter, should there be judgment rendered without a trial, the only remedy would be by appeal;[3] that, even under such circumstances, the erroneous decree could not be successfully assailed in a collateral action.

Martin *v.* McKinney, Sneed, (Ky.) 380; Cannon *v.* Wood, 2 Sneed, (Tenn.) 177; Williams *v.* Stewart, 3 Wis. 773; Hamilton *v.* Burum, 3 Yerg. (Tenn.) 355; Chandler *v.* Nash, 5 Mich. 409; Bryan *v.* Smith, 10 Mich. 229; Stockett *v.* Nicholson, 1 Miss. 75; State *v.* Metzger, 26 Miss. 65; Sullivan *v.* Blackwell, 28 Miss. 737; Edwards *v.* Toomer, 22 Id. 75; Wickes *v.* Caulk, 5 Har. & J. (Md.) 36; Proctor *v.* State, 5 Harr. (Del. 387; Potomac Steamboat Co. *v.* Clyde, 51 Md. 174; McKenzie *v.* Ramsay, 1 Bailey, (S. C.) 459; Harvey *v.* Huggins, 2 Id. 267; Hill *v.* Pride, 4 Call, (Va.) 107; Owen *v.* Jordan, 27 Ala. 608; Foster *v.* Glazener, Id. 391; Gray *v.* Reveille, 6 Wis. 59; Harris *v.* Hardeman, 14 How. 343.

[1] Haywood *v.* Collins, 60 Ill. 328; Foyles *v.* Kelso, 1 Blackf. 215; O'Brien *v.* Daniel, 2 Id. 291; Leach *v.* Swann, 8 Id. 68; Clark *v.* Thompson, 47 Ill. 26; Schnell *v.* City of Chicago, 38 Ill. 383; Morris *v.* Hogle, 37 Ill. 150; Cariker *v.* Anderson, 27 Ill. 358; Rowley *v.* Berrian, 12 Id. 198; Vairin *v.* Edmonson, 5 Gilman, 270; Lawrence *v.* Yeatman, 2 Scam. 15; Buckley *v.* Lowry, 2 Mich. 418; Roelofson *v.* Hatch, 3 Id. 277. In King *v.* Harrington, 14 Mich. 532, the court said, (p. 541): "Where there is no personal service, the publication of notice is necessary to enable the court to obtain jurisdiction; and no judgment is valid without it. It has always been required in special proceedings against parties not served or appearing, that the substituted service shall be strictly regular under the statutes. Thompson *v.* Thomas, 11 Mich. 274. And the statute makes proof of publication a pre-requisite to the plaintiff's declaring and proceeding to judgment." The case was a collateral attack on an attachment judgment. In Millar *v.* Babcock, 29 Mich. 526, judgment in an attachment suit, without the notice required by statute, was treated, in a collateral action, as not merely voidable, but void for want of jurisdiction.

[2] Crane *v.* Kimmer, 77 Ind. 215, held, where judgment of partition was collaterally attacked, it was presumed that process had been duly served on all parties.

[3] Clark *v.* Lassen Co. Court, 55 Cal. 199.

But a court which has jurisdiction of the subject-matter of the personal suit does not therefore have it in the ancillary attachment proceeding; the subject-matter of the former does not include the *res* of the latter; the defendant may be personally in court, yet no lien may be created upon his attached property for want of compliance with statutory requisites.

The presumption is not applicable when a court has exercised special authority,[1] even though it be a tribunal of general jurisdiction. The record should show that the procedure was in accordance with statute authorization, and publication notice should affirmatively appear. It ought to appear by the return thereon and the proof thereof, duly entered.

But when an attachment case has been tried, and the fact found in the judgment that "publication was duly and legally made on the defendant," it has been sometimes held that the judgment could not be collaterally impeached as void for want of notice.[2] The State statutes do not all specify minutely in what form the record evidence of publication notice shall appear; and, when they are not pointed, the courts have some latitude of interpretation. When a statute imperatively prescribes what shall be conclusive record evidence in an attachment suit, courts follow it though the provision may be novel.[3]

When the statute makes publication, (in the absence of service or appearance,) a prerequisite to further procedure, proof of publication must appear of record as a jurisdictional fact; and there is no presumption favoring the decree in the absence of record evidence; and the judgment may be treated as void and altogether disregarded in a collateral action against a purchaser

[1] Bruhn *v.* Jefferson Bank, 54 Tex. 152.

[2] Gregg *v.* Thompson, 17 Iowa, 107; Kilnease *v.* Blythe, 6 Hump. 378; Cornelius *v.* Davis, 2 Head, 253; Gunn *v.* Mason, 2 Sneed, 637. These Tenn. cases superseded by Walker *v.* Cottrell, 6 Bax. 257.

[3] In New York, under a statute making the appointment of trustees "conclusive evidence that the debtor therein named was a concealed, absconding or non-resident debtor * * * and that all the proceedings previous thereto, [to such appointment,] were *regular*," the court held that irregularities could not be investigated collaterally. No title to property sold under an attachment judgment was in controversy. Matter of Clark, 3 Denio, 167, 169.

claiming title under such judgment for the attaching creditor. This is true wherever the statute expressly or impliedly makes publication an indispensable preliminary to further procedure; it is jurisdictional; and the omission of it does not render a decree merely voidable but absolutely void. In such case, a purchaser at a sale of the property under execution is not protected in his title.[1]

Collateral attacks upon attachment judgments, by means of ejectment suits against purchasers at attachment sales, have given occasion to the discussion of the effect of the want of notice, and of the failure of the record to show notice, so far as such effects concern purchasers. There is a disposition to protect the purchaser. Doubtless there are many circumstances under which he should be fully protected from loss when the title he has bought fails for want of some legal proceeding in the case in which it was attached, for which he is in no wise accountable. Doubtless he often should be allowed to recover the purchase money, and whatever else is necessary to make him whole, though he cannot successfully defend his title. There are very many circumstances which would preclude his being cut off from recovery under the plea that he bought at his own risk. That subject is not now under the pen. Can he hold the property itself, if the former owner, the attachment-debtor, was not present, nor summoned, nor notified in the proceeding under which the property was executed?

It is certain that if the title of the defendant has not been divested, as to him, it cannot have been vested in the purchaser. It is also certain that if the proceedings are an absolute nullity

[1] King *v.* Harrington, 14 Mich. 532; Miller *v.* Babcock, 29 Id. 526; Haywood *v.* Collins, 60 Ill. 328; Haywood *v.* McCrory, 33 Ill. 459; Clark *v.* Thompson, 47 Ill. 26; Schnell *v.* City of Chicago, 38 Id. 382; Morris *v.* Hogle, 37 Id. 150; Jones *v.* Jones, 16 Id. 117; Clark *v.* Bryan, 16 Md. 171; Johnson *v.* Layton, 5 Harr. (Del.) 252; Anderson *v.* Coburn, 27 Wis. 558; Freeman *v.* Thompson, 53 Mo. 183; Warner *v.* Webster, 13 Ohio, 505; and the following, not confined to attachments, but supporting the same principle: Huls *v.* Buntin, 47 Ill. 396; Campbell *v.* McCahan, 41 Id. 45; Miller *v.* Handy, 40 Id. 448; Goudy *v.* Hall, 30 Id. 109; Stricker *v.* Kelly, 7 Hill, 10; Foyles *v.* Kelso, 1 Blackf. 215; O'Brien *v.* Daniel, 2 Id. 291; Leach *v.* Swan, 8 Id. 68.

as to the defendant, he is not bound to sue out a writ of error to have them declared such.

When suit has been brought in one county, attachments in another may be sued out; but the suit cannot legally be said to be brought, unless there has been service upon the defendant, or attachment of property of his with publication notice. Where a petition is filed but no writ nor summons served, or an attachment sued out but no levy made, there is no suit brought. In a suit against two makers of a note, one living in the county where the suit is brought and the other in another State but having property in that where the suit against the first is brought though in a different county, it may be reached by attachment and publication, issued in the suit in which the first defendant had been served, where the statute so authorizes;[1] and where there is no statute authorization of that character, an attachment suit against the non-resident, brought by levy and publication in the county where his property is situated, ought not be prejudiced by the fact that his co-obligor on the note had been personally sued in a different county.

The court has no jurisdiction when the record does not show service or attachment or garnishment in the county.[2]

Sec. 6. Territorial Limits.

Courts have no extra territorial jurisdiction, over either persons or property, in attachment suits.

Jurisdiction must be over property, or persons, or both. A court cannot take jurisdiction of a personal action against a non-resident who is not cited, but it may proceed against property of his that is within the State. One who is within the territorial jurisdiction of a court may be cited to appear, and may be defaulted for non-appearance. After citation, whether he appear or not, a binding judgment may be rendered against him. The power of the court over him does not depend upon his having property within the State. But, on the other hand, if he is non-resident and cannot be cited, the court can proceed

[1] Haywood *v.* McCrory, 33 Ill. 459; Fuller *v.* Langford, 31 Ill. 248; Hinman *v.* Rushmore, 27 Ill. 509.

[2] Johnson *v.* Johnson, 26 Ind. 441.

only against property of his within the State. After giving him notice of its seizure, the proceeding may go on against the property to its condemnation. However great the demand, no judgment can be rendered, of binding effect, beyond the value of the property proceeded against to judgment; and any excess would be *coram non judice*.[1]

There is a presumption that the owner knows of the seizure of his property, when it is taken from him personally; and the presumption has even been extended to cases where property was taken from his agent. More weight is given to this presumption in some States than in others. The owner is sometimes erroneously said to be brought into court by his property. Publication is, however, required in addition to the seizure of property, to give the owner such notice as will enable the court to proceed to the condemnation of the thing seized. Seizure of property and publication do not give the court jurisdiction over the owner as a party to the suit; both combined constitute no service upon him but merely notice to him; and therefore no judgment binding upon him personally, susceptible of following him anywhere, entitled to recognition as a judgment in any State, can be rendered. Though the condemnation of the property ought to be respected everywhere, (when the proceeding has been *in rem* with publication notice,) the judgment against a person, after publication, and without citation, ought not to be recognized as a personal judgment in any State—not even in that of its rendition.[2] Courts in each

[1] Boswell's Lessee *v.* Otis, 9 How. 336; Picquet *v.* Swan, 5 Mason, 35; Thompson *v.* Thomas, 11 Mich. 274. "Where there is no personal service, the publication of notice is necessary to enable the court to obtain jurisdiction; and no judgment is valid without it. It has always been required, in special proceedings against parties not served or appearing, that the substituted service shall be strictly regular under the statutes. The publication stands in lieu of personal summons." King *v.* Harrington, 14 Mich. 532, 541; Clymore *v.* Williams, 77 Ill. 618; Fitzsimmons *v.* Marks, 66 Barb. 333; Miller *v.* Dungan, 36 N. J. L. 21; Livingston *v.* Smith, 5 Pet. 89; Ricketts *v.* Henderson, 2 Cr. C. C. 157; Lincoln *v.* Tower, 2 McLean, 473; Boyd *v.* Urguhart, 1 Sprague, 423; Warren Manuf. Co. *v.* Etna Ins. Co. 2 Paine, 502.

[2] Smith *v.* Cutchen, 38 Mo. 415; Darrance *v.* Preston, 18 Iowa, 396; Hakes *v.* Shupe, 27 Id. 465; Mitchell's Admr. *v.* Gray, 18 Ind. 123.

State must give "full faith and credit" to the judicial proceedings of every other State, provided the proceedings are by courts having jurisdiction—and there may always be inquiry with respect to jurisdiction.[1]

Courts may go so far in the inquiry concerning the jurisdiction of other courts beyond the State limits, when asked to recognize and enforce judgments there rendered, as to allow evidence contradictory of jurisdictional facts stated in the record.[2] Even when the proceedings under inspection are in the form of a personal action, they can only be sustained in the absence of personal citation or appearance, where they are really *in rem* and there have been seizure and publication, and the court rendering judgment has had jurisdiction over the thing by having possession of it. And the record must show the jurisdictional facts essential to the sustaining of the decree;[3] for, though the record is not absolutely conclusive beyond susceptibility of being contradicted, in its affirmation of such facts, there can be no proof to sustain jurisdiction when those facts do not affirmatively appear of record. In other words, should the record show publication, that fact may be investigated in a collateral proceeding and may possibly be disproved; but, should the record of an attachment suit fail to show service, publication, or appearance, or fail to show that affidavit was made and all statutory requisites observed, and the judgment should be collaterally assailed, no evidence would be admissible to prove publication or supply any of these fatal omissions.

If a judgment shows the necessary jurisdictional facts, and it is collaterally assailed in a State other than that in which the

[1] D'Arcy *v.* Ketchum, 11 How. 165; Webster *v.* Reid, Id. 437; McElmoyle *v.* Cohen, 13 Pet. 312; The Lafayette Ins. Co. *v.* French, 18 How. 404; Rose *v.* Himely, 4 Cr. 269; Harris *v.* Hardeman, 14 How. 334; Christmas *v.* Russell, 5 Wall. 290; Elliott *v.* Piersol, 1 Pet. 328; U. S. *v.* Arredondo, 6 Pet. 691; Voorhies *v.* Bank of U. S. 10 Pet. 475; Wilcox *v.* Jackson, 13 Pet. 511; Shryver's Lessee *v.* Lynn, 2 How. 59; Hickey's Lessee *v.* Stewart, 3 How. 762; Williamson *v.* Berry, 8 How. 540.

[2] Thompson *v.* Whitman, 18 Wall. 457.

[3] Harris *v.* Hardeman, 14 How. 334; Borden *v.* Fitch, 15 Johns. 141; Starbuck *v.* Murray, 5 Wend. 156; Christmas *v.* Russell, 5 Wall. 290; Elliott *v.* Piersol, 1 Pet. 328, 340.

judgment was rendered, the assailant may introduce evidence to disprove the record and contradict the jurisdictional facts stated therein as having been passed upon judicially. In the language of Mr. Justice Bradley: "If it is once conceded that the validity of a judgment may be attacked collaterally by evidence showing that the court had no jurisdiction, it is not perceived how any allegation contained in the record itself, however strongly made, can affect the right so as to question it. The very object of the evidence is to invalidate the paper as a record. If that can be successfully done, no statements contained therein can have any force. If any such statement could be used to prevent inquiry, a slight form of words might always be adopted so as effectually to nullify the right of such inquiry. Recitals of this kind must be regarded like asseverations of good faith in a deed, which will avail nothing if the instrument is shown to be fraudulent. The records of the domestic tribunals of England and some of the States, it is true, are held to import absolute verity as well in relation to jurisdictional facts as to all other facts, in all collateral proceedings. Public policy and the dignity of the courts are supposed to require that no averment shall be admitted to contradict the record. But, as we have seen, that rule has no extra territorial force."[1]

If the assailant offer evidence tending to disprove the jurisdictional facts of the record offered in a State other than that in which the judgment was rendered, it is obvious that the other party may combat such evidence and sustain the facts which the record recites.

Jurisdiction over persons and property, in any State, is confined to the persons and property within the territorial bounds of the State. No court within it can exercise jurisdiction beyond it. To exercise it over persons or property in another State would be an unwarrantable assumption and arrogation of unlawful authority, entitled to no respect on the principle of comity, but meriting rebuke and resistance as wanton abuse of power.[2] A judgment rendered in any State against a per-

[1] Thompson *v.* Whitman, 18 Wall. 468.

[2] D'Arcy *v.* Ketchum, 11 How. (U S.) 165.

son or property over which the court has no jurisdiction, is not entitled to "full faith and credit" in other States, but its validity may be questioned on jurisdictional grounds, and its enforcement resisted,[1] for, not being by due process of law, it is entitled to no regard, even in the State where it is rendered; and it may be impeached collaterally anywhere.[2]

No State in the Union has authority beyond its bounds, in any of its departments; and therefore it can confer none upon its judiciary. As the power of the United States Government is limited to its own territory, (except on the high seas, in common with the government of other nations, and such rights and powers as it has under international law,) so the power of any single State is without ex-territorial authority. As well might the United States attempt to authorize its tribunals to adjudicate upon persons or property abroad, as for any State to attempt it upon persons or property in another State.

Since jurisdictionless judgments rendered against persons or property beyond State bounds, are *coram non judice* within the State where they are rendered as well as beyond, it follows that federal courts, sitting therein, are not obliged, indeed, are not at liberty, to give effect to them. Federal courts are not foreign tribunals in relation to the courts of the State in which they may be sitting, but they have a separate jurisdiction; they observe the laws of the State in which they sit, though they derive their authority from a source exercising different and special powers of sovereignty. But there is nothing in the exceptional way in which they are constituted, nor in their

[1] Constitution, Fourth Amendment.

[2] Wilcox *v.* Jackson, 13 Pet. 511; Shriver's Lessee *v.* Lynn, 2 How. 59; Hickey's Lessee *v.* Stuart, 3 How. 762; McElmoyle *v.* Cohen, 13 Pet. 312; Williamson *v.* Berry, 8 How. 540; D'Arcy *v.* Ketchum, 11 How. 165; Thompson *v.* Whitman, 18 Wall. 457; Eaton *v.* Badger, 33 N. H. 228; Carleton *v.* Washington Ins. Co. 35 N. H. 162; Webster *v.* Reed, 5 Wend. 156; Bissell *v.* Briggs, 9 Mass. 462; Commonwealth *v.* Greene, 17 Id. 514, 545; Hunt *v.* Johnson, Freeman, (Miss.) 282; Kibbe *v.* Kibbe, Kirby, (Ct.) 119; Maude *v.* Rhodes, 4 Dana, (Ky.) 144; Austin *v.* Bodle, 4 Monroe, (Ky.) 434; Phelps *v.* Holker, 1 Dall. (Pa.) 261; Hitchcock *v.* Aicken, 1 Caine, (N. Y.) 460; Miller *v.* Sharp, 3 Randolph, (Va.) 41; Hopkirk *v.* Bridges, 4 Hening & Munford, (Va.) 413; Smith *v.* Cutchen, 38 Mo. 415; Darrance *v.* Preston, 18 Iowa 396; Hakes *v.* Shupe, 27 Id. 465; Mitchell's Admr. *v.* Gray, 18 Ind. 123.

relation to the State in which they may be sitting, nor to its laws, which warrants them in giving effect to judgments rendered in disregard of jurisdictional requisites.

Even if a State has passed a statute authorizing its courts to take jurisdiction of personal actions against debtors or others who cannot be reached by process, or of property actions when the property cannot be seized actually or constructively; and if the courts proceed accordingly and render judgments, such judgments are not to be regarded by the courts of other States, nor by federal courts sitting within the State, nor by courts of the State itself, for the reason that no State can exercise power beyond its bounds, nor conclude persons or property beyond them. Such statutes have been passed; such power has been assumed and exercised, in more than one State, though very rarely. Courts have been thus nominally authorized to take cognizance of personal actions against non-residents, after publication notice, without personal summons, personal appearance, or attachment of property; but the Supreme Court of the United States has decided such proceedings under such a statute to be jurisdictionless, null and void.[1]

The practice of proceeding by personal action against a non-resident debtor, after notice of publication, with the view to reach his property thereunder, situated within the State, by execution following judgment, has been defended in this way: "Attachment," say its defenders, "is nothing more than a preliminary seizure to aid final execution; it is as effective, when made after judgment as if made before, provided the property remains within the jurisdiction so that it can be found; it may be subjected to the payment of its non-resident owner's debt if attached preliminarily and the debtor notified by publication; and why may he not be notified by publication without any preliminary attachment, and the proceeding go on to judgment to be followed by a writ of *fieri facias?*"

The answer is that attachment *is* something more than a preliminary seizure to aid execution, if the debtor be not personally served and does not appear. It is, in such case, an act

[1] Pennoyer *v.* Neff, 95 U. S. 714—the case involving a statute of Oregon.

essential to jurisdiction. The publication notice does not bring the debtor into court, but attachment, validly laid, brings his property into court.

Is the record of a judgment of a court in another State entitled to full faith and credit, under art. 4, § 1 of the Constitution of the United States, only when the court had jurisdiction of the parties? May a defendant, when sued upon a judgment rendered in another State, plead and prove that he was not there served with process? No — if there was process against his property and he had notice.[1]

To the rule of comity there is this exception: no court is bound to give "faith and credit" to judgments rendered in other States, when their enforcement would be violative of the policy or the juridical morality of its own State.

The topic of this chapter has not been exhausted. The jurisdiction under which goods officially though illegally attached may be protected from replevy by encroaching courts, and some other species of qualified judicial authority, will be noticed hereafter; and there will be necessary recurrence to the powers already treated. Jurisdiction is half the whole subject of Attachment and Garnishment, and it must interline all the remaining chapters.

[1] See Gilman *v.* Gilman, 126 Mass. 26; but the question was not whether a judgment duly rendered in a State other then Massachusetts, in a proceeding *in rem*, would be entitled to full faith and credit.

CHAPTER XI.

CHARGING THE GARNISHEE.

§ 1. Nature of the Proceeding.
2. Interrogatories.
3. Default.
4. Exceptions to Interrogatories.
5. The Answer.
6. Amended Answer.
7. Traverse of the Answer.
8. Charging Order, Interest and Costs.

Sec. 1. Nature of the Proceeding.

Garnishment is the warning given, by the plaintiff in a suit, to a third person who owes the defendant or has property of the defendant, prohibiting him from paying his debt or delivering the property to the latter before the decision of the suit, and bidding him to hold the money or property subject to the order of the court when the decision is rendered. It is a species of seizure by notice, made by order of court, at the instigation of the plaintiff, to facilitate the execution of any judgment that may be rendered against the defendant by securing and preserving such property and credits of the defendant as are liable to execution. It is not such a seizure as to make the serving officer the custodian of that which is seized, but rather such as to make the defendant's debtor or his property-holding-agent the keeper of the thing arrested in his hands. It is the process by which the third person thus indebted or entrusted is brought into court and made subject to the decree to be rendered, though not strictly made a party to the suit. It is a summons for him to appear and answer whether or not he has property of the defendant or is indebted to him, as well as a warning against payment or delivery to the defendant under penalty of rendering himself liable to pay a like amount to the plaintiff in case he should succeed in the suit then pending, or without such contingency when garnishment is in aid of the

execution of a judgment already rendered. It is an attachment in the hands of a third person, in an attachment suit, or a seizure in such hands by way of executing an ordinary judgment against the defendant.[1]

The proceeding against the garnishee can be explained, and all its peculiarities and anomalies presented, more easily when treated as a suit than when described as something different. It is strikingly dissimilar to all other suits in several particulars, yet it is a judicial cause between parties; it is begun by a summons or its equivalent, and it results in a judgment, with all the other characteristics essential to a law-suit. In this proceeding there may be, and there often is, a litigious contest; witnesses may be introduced by either party; an issue of fact may be tried by jury; judgment may be rendered for or against the garnishee; judgment against him may be executed; and appeal may follow judgment. When there is such litigious contest, the existence of a suit is readily apparent; but when, after summons, in response to interrogatories, the garnishee answers so as to preclude any contest, is the garnishment proceeding a suit? Should he unequivocally deny liability and obtain his discharge; or admit it, and acquit himself by paying or delivering to the court; or, making no opposition, should acknowledge his liability and submit to the order of court, could it be rightly said of him that he is only a witness?[2]

As in any law-suit whatever, the defendant may decline to

[1] Jaffray's Appeal, 101 Pa. St. 583; Lush *v.* Galloway, 52 Wis. 164; Swett *v.* Brown, 5 Pick. 178; Benton *v.* Snyder, 22 Minn. 247; Blaisdell *v.* Ladd, 14 N. H. 129; Padden *v.* Moore, 58 Iowa, 703; Kennedy *v.* Brent, 6 Cr. 187; Matthews *v.* Smith, 13 Neb. 178; Tindell *v.* Wall, Busbee, 3; Wells *v.* American Express Co. 55 Wis. 23; Thompson *v.* Allen, 4 Stewart & Porter, 184; Watkins *v.* Field, 6 Ark. 391; Bryan *v.* Lashley, 13 Smedes & M. 284; Martin *v.* Foreman, 18 Ark. 249; Tillinghast *v.* Johnson, 5 Ala. 514; Hacker *v.* Stevens, 4 McLean, 535; Moore *v.* Holt, 10 Grattan, 284; Bigelow *v.* Andress, 31 Ill. 322; Walcott *v.* Keith, 2 Foster, 196; Renneker *v.* Davis, 10 Richardson's Eq. 289; Wilder *v.* Weatherhead, 32 Vt. 765; Johnson *v.* Gorham, 6 Cal. 195; Hicks *v.* Gleason, 20 Vt. 139. In Wisconsin, the garnishee is considered a party, and the court may order him to show his title or contract before issue joined on his answer: Lush *v.* Galloway, 52 Wis. 164.

[2] Thompson *v.* Silvers, 59 Iowa, 670: A wife may be garnished in a suit against her husband but cannot be made a witness against him.

make issue, may admit all that the plaintiff alleges, may comply at once with the demand and avoid any litigious contest, so in garnishment proceedings, the party against whom the process is directed may avoid making any issue by acknowledging all that the plaintiff alleges; but the acknowledgement would not render the proceeding in the latter case different from that in the former, so far as concerns the question whether it is a suit.

If the subject of garnishment can be simplified by treating the proceeding as a suit, and by presenting it in the order of its progress from the summons to the final acquittance of the garnishee from all responsibility, the reader will perceive that the question is not one involving mere verbiage. If this method of treatment be found advantageous to the understanding of several peculiarities of the proceeding, and of jurisdictional points frequently involved, he will further perceive that the reasons for adopting it outweigh those founded on the differences between this and all other legal causes.

If the proceeding is a law-suit, it is such from its incipiency; and not merely from the time the plaintiff takes issue and traverses the answer. Judgment eventually follows, whether the plaintiff's interrogatories be answered so as to charge or discharge the garnishee. Up to the point where issue is joined, the garnishee is none the less a party because he is like a witness; just as an ordinary defendant is none the less a party by reason of the service of interrogatories upon him which he is bound to answer as though he were a witness.

The plaintiff virtually sues the garnishee for a debt due the defendant, by the process of garnishment. He takes the shoes of the latter and asserts the rights which the latter has against a third person. He has to make out the case against the garnishee, (where he is permitted to do so,) unless the indebtedness to the defendant be admitted by the garnishee. On the other hand, the defendant to the main action does not sue the garnishee, though the garnishment is based upon the obligation due the defendant. Denying indebtedness to the plaintiff, and resisting payment, he is averse to the success of the plaintiff's side action against the third person.

Standing in the defendant's place, the plaintiff can have no greater rights than he, had the garnishee been sued by the defendant. On the other hand, if the garnishee denies indebtedness, he has the same rights of defense, and no more nor less, than if sued by his creditor. The proceeding may therefore be called a suit.[1]

The garnishee, however, is not a party to the suit between the plaintiff and the defendant: he is only a party to the suit against himself in which the plaintiff urges the rights of the principal defendant against the garnishee. The fact that the plaintiff and the garnishee are both citizens of the same State is no obstacle to the removal of an attachment suit to the federal court.[2] It is the suit between the attaching creditor and his debtor that is thus removed, because one of these parties resides in another State; and to this contest, the garnishee is not a party litigant. Attachment suits are thus transferable, like other actions.[3]

It is held that the garnishment contest, between the plaintiff and the garnishee, is not removable apart from the principal suit.[4] Under whatever State statute it may be brought, and however one suit may differ from another in other respects, the garnishment suit never stands alone, whether it is united with the principal cause in the same court or is brought separately in a different court; whether the process against the garnishee is by summons to answer interrogatories or by any other method; whether in the principal action, there is service effected upon the defendant or notice by publication to the owner of the assets attached.

The plaintiff's right of action, the effectiveness of the judgment, and the protection of the garnishee from subsequent

[1] Zanz *v.* Stover, 2 New Mex. 29; Travis *v.* Tartt, 8 Ala. 574; Moore *v.* Stainton, 22 Ala. 831; Jones *v.* N. York & Erie R. R. Co. 1 Grant, 457; Thorn *v.* Woodruff, 5 Ark. 55; Malley *v.* Altman, 14 Wis. 22; Gorman *v.* Swaggerty, 4 Sneed, 560; Smith *v.* Dickson, 58 Iowa, 441; Caldwell *v.* Stewart, 30 Iowa, 379; Padden *v.* Moore, 58 Iowa, 703; Tunstall *v.* Worthington, Hemstead, 662; Wells *v.* Am. Ex. Co. 55 Wis. 23.

[2] Cook *v.* Whitney, 3 Woods, 715.

[3] Keith *v.* Levi, 1 McCrary, 343; U. S. Rev. Stat. § 646; see Barney *v.* Globe Bank, 5 Blatchf. 110; Bates *v.* Days, 11 Fed. R. 529. *Post*, p. 485.

[4] Pratt *v.* Albright, 10 Bissel 511.

attack after payment under judgment, depend upon the principal action: its rightful institution, rightful judgment thereon and rightful execution of the judgment. Whatever dissolves the attachment releases the garnishee, though judgment may have been rendered against him. Reversal of the judgment against the principal defendant on appeal will virtually reverse the judgment against the garnishee though not appealed.

Though the principal judgment may hold good when the auxiliary one is reversed, the converse is not true. In no case can the judgment against the garnishee stand after that against the principal defendant has been set aside or reversed.[1]

Though the suit against the garnishee always is auxiliary, the proceeding against the garnisheed property or credit is not always auxiliary. When the attachment debtor is not served and not in court, and is notified only by publication, the principal suit is the proceeding *in rem*; and if nothing has been attached otherwise than in the garnishee's hands, the process against what is garnisheed is the principal suit. Curiously enough, in such case, the personal suit against the garnishee becomes auxiliary to that against the thing in his hands. Should the debtor appear at a late stage of the case, he would defend against the attachment of his property or interest in the hands of another, while the garnishee would evidently occupy a secondary place though his position would not be changed. It is apparent, (whether he afterwards appear or not,) that the court's jurisdiction depends upon something having been seized when no defendant has been served. And, if nothing has been attached except in the garnishee's hands, it is such attachment that has given the court jurisdiction; and, without it, no suit could be maintained against the garnishee.

The suit against the garnishee is hypothetical. The right of action depends upon the right of the plaintiff in the main suit. *If* the plaintiff is the creditor of the principal defendant, he

[1] Lovejoy *v.* Albree, 33 Me. 414; Greene *v.* Tripp, 11 R. I. 424; Pierce *v.* Carlton, 12 Ill. 358; Whitehead *v.* Henderson, 4 Sm. & M. 704; Atcheson *v.* Smith, 3 B. Mon. 502; Desha *v.* Baker, 3 Ark. 509; Matthews *v.* Sands, 29 Ala. 136; Flash *v.* Paul, Id. 141; Edrington *v.* Allsbrooks, 21 Tex. 186.

has a right of action against the garnishee; he may step into the shoes of the principal defendant and so become the creditor of the garnishee. In other words, he has no right to recover of the garnishee unless he can show that he ought to be subrogated to the right of the garnishee's creditor, and empowered to sue on that creditor's right. In yet other words, the attaching creditor proceeds against the garnishee on the assumption that what is due by the latter to the plaintiff's debtor may be diverted, under the law, to the payment of the plaintiff; and this assumption must be verified by judgment before his right so to divert the payment can be finally settled. In all the proceedings before final judgment in the principal suit, the plaintiff's right against the garnishee is therefore hypothetical. Though there be a judgment holding the garnishee chargeable in an unqualified decree, it is understood to be dependent upon the final judgment against the principal defendant. He is held chargeable *if* the plaintiff should make out his main case. The decree, though literally positive and free from all contingency, is qualified by law so as to render it dependent upon the principal judgment.

The garnishee is sued by one to whom he owes nothing; to whom he is under no obligation whatever. He is summoned into court by one who is not his creditor, that he may be made to pay to a stranger what he owes to his real creditor; or to deliver what property he possesses, belonging to his principal, into the hands of a court officer at the demand of a stranger.

He is sued by one not a party to the contract by which he became indebted, and is required to perform his contract-obligations by violating them; at least, the letter of the contract is disregarded by the law which diverts the payment. The demand upon him is that he pay or deliver to such stranger, not only without authority from his creditor or principal so to do, but usually contrary to the desire of the latter.

The law comes between the contracting parties, and by preserving the spirit of the contract while disregarding the letter, requires the obligor to acquit himself of his duty by performing it, not at the bidding of the obligee but of a creditor of his, provided such creditor sustain the allegations of his suit.

Pending the main action, the obligor made garnishee is required to stand still, holding in his hands the property or credit therein attached, awaiting the judgment of the court: being meanwhile protected from the man whom he really owes or whose property he has in possession.

The plaintiff is legally, (though hypothetically,) subrogated to the right of action which his debtor has for the recovery of property or credits due the debtor. He sues for such property and credits in his own name, but upon the cause of action acquired by such legal subrogation. He can recover no more than his debtor might have recovered; he cannot be limited to less, if his own claim is sufficient to cover it.

This subrogation of a right of action is the more remarkable when considered as the result springing from an *ex parte* showing on the part of the plaintiff. He sues his debtor, makes affidavit of the requisite facts; and, on the basis of such suit and showing, his right of action stands against a third person who owes him nothing and holds no property of his. Though his allegations may have been denied by the defendant in the principal suit, his right of action against the defendant's debtor or property-holding-agent will be maintained by the court till the decision of the issues involved.

The subrogation enables the plaintiff to reach property and credits of his debtor, in third hands, which rightfully ought to be made liable. It is a means of obtaining the ends of justice under circumstances which would favor the non-paying debtor were there no such subrogation. There is no reason for exempting from execution the debtor's credits or his property in third hands; but how could they be reached unless the plaintiff be subrogated to the right of action against the debtor's debtor or agent?

The law finds its justification in this rightful purpose. It violates no constitutional provision when it gives the creditor a remedy for the wrong done him by the debtor who does not pay a debt due, and who has nothing in hand out of which payment can be extracted. It violates no constitutional provision when it creates a right of action, upon an *ex parte* showing, against the debtor's debtor, even though the sum claimed by

the plaintiff may be yet undue; for it subserves the ends of justice between all the parties, promotes the general welfare and tends to circumvent fraud and prevent collusion between the defendant and the garnishee.

No contract can be violated, no promise to pay absolved, no interference between lawfully contracting parties authorized, by the legislator, without contravention of the constitution; and if the subrogation of the creditor to the right of action which his debtor has as the creditor of another person, and the warning against the payment, to the rightful creditor, of a debt due; and the suspension of all operation under a valid contract till the issue between the attachment plaintiff and the attachment defendant be decided, violate contract, absolve from payment or interfere with contracting parties without authority, they are indefensible.

The immediate effect of the attachment of the defendant's credits or goods in third hands, is not to extinguish his rights further than to prevent his present control of them; and not to create any rights in the plaintiff further than to secure him the ultimate opportunity of making his money out of such credits or goods thus subjected to legal custody. As the alleged right of the attaching creditor is merely *ad rem*, the ownership of the attached property is not divested by the attachment,[1] nor by the judgment perfecting the attachment lien. It is only where seizure is in vindication of a *jus in re*, (right *to* the thing,) that judgment is conclusive upon the title.

Sec. 2. Interrogatories.

The attaching creditor files in court interrogatories to be served on the person supposed to owe the debtor or to hold property of his. The interrogatories should be confined to the ascertaining of one or both of the facts—indebtedness and possession of property. They should be further confined to such indebtedness as would render the person addressed liable to garnishment in case of affirmative answers, and to such possession as would render him liable. They must not be imper-

[1] Scarborough *v.* Malone, 67 Ala. 570.

tinent; nor unnecessarily harassing, nor calculated to expose such business relations between the person addressed and his creditor as the exigencies of the occasion do not require to be exposed. They must not be such as to entrap the garnishee into admissions which he would not be required to make were questions plain and readily apprehensible; they must not tend to make him criminate himself; they must not be such as to deprive him of any just ground of defense against his own creditor in case of a subsequent suit. They should not be unnecessarily prolix or repetitious. They should contain all that the attaching creditor wishes to ask, so as to leave no occasion for supplemental interrogatories; but there may be supplemental ones, under leave of court. If the first set have not been served, they may, by leave, be withdrawn and amended; or, if served, supplemental questions may be propounded. There is good ground for application to file supplemental interrogatories, if new facts have come to the knowledge of the interrogator after the filing of the first.

To effect their object; to ascertain whether the person addressed is really liable as a garnishee to the amount of the debt claimed of the defendant or less; to avoid the necessity of applying for permission to file amended or supplemental questions, the interrogatories should be full, frank, searching, pointed, respectful, pertinent and not susceptible of being evaded. They should be such as to draw, if possible, even from a double-dealing man, the truth respecting his indebtedness to the defendant, or his relation to the defendant as the custodian of property liable to garnishment. They should be sufficiently incisive so as to lay bare all the facts within the bounds circumscribing the garnishee as a mere stakeholder disinterested as to whom he may be called upon to pay or to deliver; but, as before remarked, they should not go beyond those bounds to render the garnishee worse off than he was before. They may, within those bounds, cut into transactions, facts, and various matters tending to bring out the one essential fact of legal responsibility as garnishee; for, as the garnishee is not supposed to know the exact boundary of his rights and exemptions when the circumstances are complicated, the bringing out

of all the particulars may be of great importance to enable the court to understand and decide whether or not he is chargeable.

The interrogatories should not be general as to the liability of the garnishee. They should show whether he is meant to be charged as the holder of the defendant's property, or as the debtor of the defendant, or both; however the case may be, they should cover the necessary ground.[1] If asked whether he has goods or chattels of the defendant subject to execution, the garnishee would not be bound to state that he owes the defendant, and might render himself liable to the latter after having paid such debt into court, by such voluntary statement. So, if asked whether he is indebted, he should voluntarily disclose that he held property, he might afterwards be subjected to account for it to the defendant. The plaintiff should ask all that he wishes to know, within legal limits, concerning whatever the garnishee has in possession belonging to the defendant and what he owes to the defendant.

If a corporation, such as a railroad company, is garnished, the interrogatories should not ask the officer or agent upon whom they are served what *he* owes to the defendant, since his answer would not be binding upon the company.[2]

The questions may cover the time of service, the time of answering, and subsequent time where the statute authorizes it, so as to provoke answers exposing the relations of the garnishee as the debtor or property-holding agent of the defendant at any or all of those times.[3] If only required to answer as to the time when he was served with process, the garnishee, if he had nothing then and so answers, may afterwards become indebted to the defendant, or receive money for him and pay him, or receive goods for him and deliver them to him, with impunity. Or, the garnishee might pay or deliver to another creditor of the defendant. So also when there is no law for covering subsequent time.[4] Should the attaching creditor sue out a second writ of garnishment, or amend his interrogatories and have

[1] Botsford *v.* Simmons, 32 Mich. 352.

[2] Varnell *v.* Speer, 55 Ga. 132.

[3] N. O. M. & C. R. R. Co. *v.* Long, 50 Ala. 498; Bliss *v.* Smith, 78 Ill. 359; Cowdry *v.* Walker, 59 N. H. 533.

[4] Hoffman *v.* Fitzwilliam, 81 Ill. 521.

them re-served, so as to cover the subsequent time, he would be too late, if meanwhile the garnishee had divested himself of his indebtedness or possession of attachable property.[1] There is no necessity for amending the pleading or filing a supplemental complaint, when the garnishee's answer, though denying possession of the defendant's property, discloses facts which show that he is in possession of it.[2]

Upon the principle that the third person holding the funds of a defendant is disinterested as to whom he pays if he gets acquittance, the practice is liberal towards amendments made by the attaching creditor, even after interrogatories have been answered by the garnishee. This has gone so far that when a garnishee had denied indebtedness to the defendant but admitted owing the firm to which the defendant belonged, his answers were held to bind him after the plaintiff had subsequently changed his pleadings and made the firm defendant.[3] Such practice, however, is not to be commended. The proper course is to issue a second set of interrogatories and get the answer that the indebtedness is to the defendants as then in court. Where no other interests had intervened, as in the case just cited, no evil could result from the practice, but what would have been the state of things if some other creditor had meanwhile attached the debt, by garnishment, as due to the firm? Clearly the answer to the first interrogatories would not have bound the garnishee. Or, what if the garnishee had paid the firm immediately after answering, before there was any defendant but a single member of the firm? His payment would have been legal, regular and sufficient to discharge him of all liability. The right practice is, in case of the joinder of new parties in order to reach a credit of the firm in the hands of a third person, to renew the garnishment.

Sec. 3. Default.

Should the person summoned as garnishee contumaciously fail to respond, he may be defaulted. The interrogatories may

[1] Daniels *v.* Mienhard, 53 Ga. 359.
[2] Farmers' and Mechanics' Bank *v.* Welles, 23 Minn. 475.
[3] Sullivan *v.* Langley, 128 Mass. 235.

be taken *pro confesso*. His silence is deemed assent, if the questions are such that answers favorable to the interrogator would make out the chargeability of the garnishee. He cannot complain of the legal result of his own *laches*. Garnishment is a method allowed by law to facilitate justice between the litigants, and he cannot disregard such legal method with impunity.

As in other cases of default, this may be set aside by the court upon proper showing. What is proper showing is the satisfactory explanation of the neglect and seeming contumacy. The court should be even more liberal in allowing the belated garnishee to answer after default than in granting the privilege to a suitor defaulted, since he is a disinterested party in the proceeding so far as any prospect of being benefitted is concerned yet an interested third person so far as the danger of being injured is concerned.

Even if he has answered and denied indebtedness and possession of property, he may in certain circumstances be defaulted for not answering to a replication. Even if he have no notice of such replication, he may be presumed to know whatever is of record after his first appearance, when the suit is separate or in a different court from that of the principal one, in which he ought not to be expected to follow the labyrinths of a litigation in which he is not an interested party, without notice.

When the garnishee has been summoned to appear in court to be examined, but no interrogatories have been served upon him, he ought not to have judgment of default entered against him, without further effort to reach him, and without any evidence showing that he is chargeable as garnishee.[1] Nor should he be defaulted, after answering, on unimportant objections, such as that the answer was filed in vacation.[2] Where required to appear for examination in court, if he fails to do so but files his answers instead, they may be stricken out and default entered.[3] Whenever, without proper reason rendered, he fails to answer pertinent interrogatories properly served upon him, he may be

[1] Lewis *v.* Faul, 29 Ark. 470.

[2] Curry *v.* The National Bank of Augusta, 53 Ga. 28.

[3] Penn *v.* Pelan, 52 Iowa, 535.

defaulted and the interrogatories taken as confessed. Such judgment makes out a *prima facie* case of indebtedness.[1]

If he has answered, but is required by the court to make his answers more specific, and he refuses or neglects to do so, he may have judgment by default rendered against him.[2] The judgment should be by default, and not final, when rendered against a garnishee who stands by his plea to the jurisdiction after it has been overruled.[3]

A default may be set aside, on proper showing, at the term in which it was entered.[4] At a following term, a defaulted garnishee, (unless under unusual circumstances,) would come into court with bad grace to ask leave to answer and suspend execution.[5] Even though he offer to show then that the fault was the result of a mistake or surprise, the court will refuse to re-open the judgment rendered against him.[6] At that late stage, however, if the default could be set aside without injustice to the attaching creditor, the court, in the exercise of sound discretion, might grant relief upon the garnishee's showing that failure to answer was not any fault of his, unless where the court is legally inhibited from the exercise of such discretion after the close of the term.

What is an excusable mistake is a question within the court's cognizance.

A judgment by default, rendered against a garnishee who has failed to plead though notified, will not be set aside on the ground that the garnishee was taken by surprise; or that there were irregularities, if they were only such as might have been prevented by his timely response.[7]

[1] Townsend *v.* Libbey, 70 Me. 162; Freeman *v.* Miller, 53 Tex. 372.

[2] Scamahorn *v.* Scott, 42 Iowa, 529.

[3] Toledo etc. R. R. Co. *v* Reynolds, 72 Ill. 487.

[4] Scamahorn *v.* Scott, 42 Iowa, 529.

[5] *Id.*

[6] Abell *v.* Simon, 49 Md. 318.

[7] Gibbons *v.* Cherry, 53 Md. 144. In Wisconsin, after judgment against the principal defendant in a justice's court, judgment in the same amount may be rendered against a defaulting garnishee. Bushnell *v.* Allen, 48 Wis. 460. In Iowa, the court may issue executions against a defaulting garnishee two days after judgment against the defendant. Langford *v.* Ottumwa Water Power Co., 53 Iowa, 415.

If the summons was not sufficient in law to bring the garnishee into court, and he is defaulted for non-appearance, the default is void. The summons should be signed by the clerk,[1] or the proper court officer; the writ should show the case in which it is issued.[2] The writ must show that the attachment is an adjunct of the principal suit.[3] In short, the whole proceeding, including the summons to the garnishee, must have been pursuant to statute authorization, before a valid default can be pronounced against the garnishee.

Sec. 4. Exceptions to Interrogatories.

The garnishee may plead to the jurisdiction, not only to relieve himself from the care of being drawn into the attachment suit, but also to protect himself against any subsequent attack by the defendant.[4] He may so plead, if at all, before answering. Whatever would be a good reason to sustain the plea were the suit brought by the defendant would be good here where the defendant's creditor is proceeding upon the defendant's right.

Want of jurisdiction over the defendant would include the want of it over the garnishee, since the latter's position is subsidiary to that of the former respecting the court's power to hear and determine; but, beyond this, there may be other reasons why the garnishee's obligation cannot be passed upon, though the defendant's may.

The defendant must look out for the jurisdiction so far as he is concerned; for, should he waive all objection, he cannot afterwards hold the garnishee guilty of *laches* for not pleading what he might have pleaded himself.

[1] Sheppard *v.* Powers, 50 Ala. 377.

[2] Johnson *v.* McCutchings, 43 Tex. 553.

[3] Lewis *v.* Woodfolk, 58 Tenn. 25; Peak *v.* Buck, 59 Id. 71.

[4] National Bank *v.* Titsworth, 73 Ill. 591; Wyatt's Adm'r. *v.* Rambo, 29 Ala. 510; Dew *v.* Bank of Ala. 9 Ala. 323; Bushnell & Clark *v.* Allen, 48 Wis. 460; Harmon *v.* Birchard, 8 Blackf. 418; Webb *v.* Lea, 6 Yerg. 473; Robertson *v.* Roberts, 1 A. K. Marshall, 247; Featherston *v.* Compton, 8 La Ann. 285.

All statutory requirements must be strictly observed to the end that jurisdiction may vest.[1]

It may be that processes of garnishment are issued from courts of two States, on or about the same time, to the same garnishee, relative to the same debt. Both suits may have the same defendant, and the same person summoned as his debtor, though the attaching creditors be different. Under such circumstances, which creditor ought to have the benefit of garnishment? To which should the garnishee be ordered to pay? Which of the two courts should maintain jurisdiction over the garnishee, and which should yield to the other? Circumstances may arise from time to time, and present such complication, that it will be difficult to answer the question proposed; but it may be said, in a general reply to it, that whichever court first brings the garnishee within its authority so as to be entitled to his first answer, ought to have the control of the fund or debt subjected to garnishment. If in one State a person is summoned as garnishee, and afterwards, (though on the same day, it may be,) he is summoned as such in another State; and his answer with a disclosure of his second summons be made in the court of the first State, and that court should hold him bound as garnishee, the court of the second State should yield, and should discharge the garnishee upon such facts being made to appear.[2] The general rule that payment by a garnishee, under judgment, discharges him, is applicable.[3]

Exceptions to interrogatories may be taken when they are of such character that the law does not require that they should be answered. Persons interrogated respecting funds officially held which are not subject to garnishment; persons questioned about business relations of such character that neither an

[1] Gibbon *v.* Bryan, 3 Ill. App. 298. (And, in Ill., the judgment against the garnishee should be in favor of the defendant in execution for the use of the plaintiff. *Id.*) Railroad *v.* Todd, 11 Heisk. 549; Greene *v.* Tripp, 11 R. I. 424; Smith *v.* McCutchen, 38 Mo. 415; Ford *v.* Dry Dock Co. 50 Mich. 358; McDonald *v.* Vinette, 58 Wis, 619; Wells *v.* Am. Ex. Co. 55 Wis. 23.

[2] Garity *v.* Gigie, 130 Mass. 154.

[3] Stockwell *v.* McCracken, 109 Mass. 84; American Bank *v.* Rollins, 99 Mass. 313; Whipple *v.* Robbins, 97 Mass. 107; Hull *v.* Blake, 13 Mass. 153.

affirmative nor a negative reply would avail the interrogator, may except and may withhold response till the court pass upon the exception. All impertinent, disrespectful and illegal interrogatories may be resisted by exception. If some are right and others wrong, the former may be answered and the latter resisted. If answers have been filed, and then further interrogatories propounded without leave of court, the garnishee may except that he has already answered and is not obliged to respond a second time; and then, till the court decide, he may safely be silent. If the court has already granted leave for the second propounding, it has not passed at all upon the character of the questions; and, if they are a mere repetition, (either in the same or different verbiage,) of those already answered; or if they are objectionable for any other reason, the garnishee may yet except—not now to the right of propounding, but to the questions propounded.

It is often of the highest importance, involving the garnishee's future protection, that he should resist improper and illegal inquisition. It is always the safer course to proceed under judicial orders and not to do unnecessary things which might afterwards be charged to have been voluntary disclosures.[1] He is not bound to answer irrelevant interrogatories,[2] but his right way to avoid them is by excepting to them, and submitting the question of relevancy to the court.

The failure of the summons to specify the time within which the interrogatories should be answered, is not a good ground for exception.[3]

Where the practice is to issue a writ of garnishment as mere process to bring the summoned party into court, demurrer will not lie to such writ, but the remedy against defects is by plea in abatement or a motion to quash.[4]

A co-defendant, after judgment *in solido* against two or more, if garnished in execution, may personally except,[5] for the reason

[1] Gould *v.* Meyer, 36 Ala. 565; Gunn *v.* Howell, 35 Id. 144.

[2] Rhine *v.* Danville, &c. R. R. Co. 10 Phila. 336.

[3] Hearn *v.* Adamson, 64 Ga. 608.

[4] Curry *v.* Woodward, 50 Ala. 258.

[5] Bailey *v.* Lacey, 27 La. Ann. 39. Richardson *v.* Lacey, Id. 62. See Curry *v.* Woodward, 50 Ala. 258.

that execution to the amount of the whole judgment may be directed against him alone.

The garnishee may except to the interrogatories, (or to the suit against him,) on the ground that the plaintiff had not made affidavit to sustain his alleged grounds of attachment, nor given the statutory bond to secure the defendant, nor caused publication in default of service. It is necessary that the garnishee should set up these exceptions when the defendant himself is not in court, for the purpose of future protection.[1]

Sec. 5. The Answer.

The answer must be sworn, must be responsive to the interrogatories, must be categorical when the questions so require and the facts will so admit, and may be accompanied with such explanation as is necessary. It must be impartial as between the plaintiff and defendant, free from argumentative statements; it must be such as the garnishee could rightly be held to in case of a subsequent suit by his creditor in case of his discharge from the garnishment, and such as would protect him from re-payment in case he should be held liable to the garnishment.

If summoned as garnishee in more than one suit against the defendant, he should state in his answer to the second and subsequent garnishments that he has already answered in the first, (and where there are more than two, he should likewise state all antecedent answers,) and also true response make to all interrogatories; but he is, as a matter of course, only liable to pay once. When held in the first, he is entitled to discharge in the subsequent ones.

When the answer is not fully responsive, it may be excepted to, and the court may require full answer. When it is refused, the garnishee will be condemned to pay. When it is equivocal,

[1] Railroad *v.* Todd, 11 Heisk. 549: Oldham *v.* Ledbetter, 1 How. (Miss.) 43; Ford *v.* Hurd, 4 Sm. & M. 683; Ford *v.* Woodward, 2 Id. 260; Washburn *v* N Y. &c. Co. 41 Vt. 50; Pope *v.* Hibernia Ins. Co. 24 Ohio St. 481; Clarke *v.* Meixsell, 29 Md. 221; Barr *v.* Perry, 3 Gill, 313; Bruce *v.* Cook, 6 Gill & J. 345; Stone *v.* Magruder, 10 Id. 383; Shivers *v.* Wilson, 5 Harr. & J. 130; Yerby *v.* Lackland, 6 Id. 446; Kimball *v.* McComber, 50 Mich. 362.

dishonest and false, he will be condemned to pay. His own interest, as well as his duty; his relation to his own creditor as well as his attitude towards the attaching plaintiff, require that he be entirely frank, truthful and courteous.

But his own interest, duty and relation to either party do not require him to answer questions not pertinent, to expose matters not properly drawn into the litigation, or to render himself liable to pay a debt twice.

The answer is not confined to personal knowledge, nor always to the rule requiring the best evidence. It may contain what is known only from the information of others, or it may be based upon belief rather than perfect knowledge;[1] it may be an oral statement of facts contained in a deed or other instrument under seal,[2] especially if elicited by the interrogatories of the garnishor or by questions put by him upon further examination. But it is usually required to be in writing, and to be signed.[3] What is stated upon oral examination is a part of the answer and must be taken with it.[4] If both the original response and the subsequent disclosure do not show that the garnishee has property of the defendant or is a debtor of his, there can be no order in favor of the attaching creditor.[5] The latter cannot deny the truth of the answer, when he does not traverse, and cannot recover beyond the admitted liability.[6]

A corporation should answer as garnishee through its official head, by the officer entitled to use its seal, or by such person as the body is accustomed to put forward to represent it in legal matters provided he is so authorized that his answers will bind the corporation. When an oath is requisite, it must be made by the President, Mayor or other official head, or by the duly authorized person who is capable of binding the corporation,

[1] Sexton *v.* Amos, 39 Mich. 695; Crossman *v.* Crossman, 21 Pick, 21; Bostwick *v.* Bass, 99 Mass. 469; Fay *v.* Sears, 111 Id. 154; Shaw *v.* Bunker, 2 Met. 376; Laughran *v.* Kelly, 8 Cush. 199. See Smith *v.* Chicago, &c. R. R. Co. 60 Iowa, 312.

[2] Allen *v.* Hazen, 26 Mich. 142.

[3] Taylor *v.* Kain, 8 Bax. 35.

Wilson *v.* Wagar, 26 Mich. 452; Campau *v.* Traub, 27 Mich. 217.

[5] Kane *v.* Clough, 36 Mich. 436; Hewitt *v.* Wagar Lumber Co 38 Mich. 701.

[6] Newell *v.* Blair, 7 Mich. 103; Thomas *v.* Sprague, 12 Id. 120; Piquet *v.* Swan, 4 Mason, 460; Marks *v.* Reinberg, 16 La. Ann. 348.

whoever he may be under the charter or act of incorporation.[1]

Any member of a garnished firm may answer for it.[2] A general agent may answer for a foreign corporation, if authorized to receive service of process in its behalf.[3] The officer answering for any corporation need not necessarily be the one on whom the writ or list of interrogatories was served.[4]

Doubtful and equivocal answers, whether intended to be so or not, must generally be construed against the garnishee. The rule works hardship in many instances, but what else is the court to do? The garnishee has had his opportunity of denying liability; has had his time for collecting the facts and for maturing his responses; has had the benefit of counsel if he chose to avail himself of it, and if, after all, he has innocently or otherwise rendered himself chargeable by ambiguous statements, the court may not always come to his relief and deprive the plaintiff of the means of making his money.

Construed against himself, the answers of the garnishee must not yet be strained or distorted to his prejudice, though somewhat ambiguous; they should receive fair dealing at the hands of the court; and if the garnishee's error is one of law, the court should not hold him accountable. Discrepancies may be reconciled by a comprehensive view of the answer as a whole. No technical nicety should be permitted to entrap the honest holder of defendant's property or credit into such position as would render him doubly liable.

If the person questioned answers as well as he can, tells all he knows, and the state of facts thus disclosed render it doubtful whether he is liable, he ought to be discharged. Such doubt is not attributable to any evasiveness or wrong-dealing of his, and he should be protected.

[1] Balt. & Ohio R. R. Co. *v.* Gallahue, 12 Gratt, 655; Head *v.* Merrill, 34 Me. 586; Oliver *v.* C. & A. R. R. Co. 17 Ill. 587. It was held in Georgia that the temporary absence of the president of a domestic corporation will not warrant service of garnishment on a subordinate officer or agent. Steiner *v.* Central R. R. Co. 60 Ga. 552.

[2] Dupierris *v.* Hallisay, 27 La. Ann. 132.

[3] Lorman *v.* Phœnix Ins. Co. 33 Mich. 65.

[4] Duke *v.* R. I. Locomotive Works, 11 R. I. 599.

Though the garnishee is disinterested in the result of the suit between the plaintiff and the defendant, he may, to protect himself, be obliged to set up against the garnishment such defenses as the defendant would have the right to urge affirmatively against the garnishee, in a subsequent action. If the defendant has already satisfied the attaching creditor's claim, and the garnishee knows that fact, he ought, for his own sake as well as that of the defendant, to urge it by way of exception or answer to the garnishment. If a garnishee in execution, he certainly may and should plead that the judgment sought to be executed has already been satisfied, if such is the fact. If, for any reason, the creditor no longer has any claim against his former debtor, the garnishee should not, by the payment of what he owes, or the delivery of what he holds, put the defendant to trouble in regaining what he truly owns.

If the answer is a denial of indebtedness to the defendant, and denial of possession of any property of his, the plaintiff, acquiescing therein, has no attachment suit; and if he proceeds against the defendant, the action is only personal.[1]

When, by reason of the absence of the defendant or other cause, the garnishee is obliged to defend the principal suit for his own future protection, he may urge whatever defense upon the merits the defendant might have urged, and he may demur or except to the action, especially on jurisdictional grounds; but he is not bound, in order to his own future protection, to set up merely technical obstructions and defenses. When he answers and is examined in the presence of the defendant he is not only relieved from the necessity of raising technical objections but he is precluded from making such points as that the sheriff's return was not properly endorsed or that the garnishment service was on but one of two partners.[2] No rigid rule can be laid down, however, as to the latitude the garnishee may take for his own protection in defending the principal suit in the absence of the defendant. Even amendable errors may be

[1] Littlejohn *v.* Lewis, 32 Ark. 423; Leingardt *v.* Deitz, 30 Ark. 224.

[2] At least it was so held in Bushnell *v.* Allen, 48 Wis. 460—the statute in Wisconsin requiring the summons in garnishment to be served on the principal debtor. See Mooney *v.* Union Pac. R. R. Co. 60 Iowa, 346

of such a character that exception to them would be of the highest importance.

If the defendant has confessed judgment, the garnishee cannot defend the principal suit, being fully protected against any future attack by the defendant, and perfectly safe in paying into court under order.[1] He should not be made a party to a feigned issue.[2]

As a general rule, the garnishee is not bound to notice mere irregularities of procedure against the defendant; nor to defend the main suit when the defendant is in court or under summons; he is not so bound when the court is vested with jurisdiction over both, nor is he interested in doing so since the decree of the court would protect him from a future suit for funds paid over or property delivered under judicial order to him as garnishee.[3]

The answer that under a prior garnishment by a different plaintiff indebtedness to him had been admitted, would be of no avail to discharge the garnishee, even though the plaintiff in the prior garnishment was the husband of the attaching creditor of the second suit, when the latter is a sole trader or is

[1] Bartlett *v.* Wilbur, 53 Md. 485.

[2] Fish *v.* Keeney, 91 Pa. St. 138.

[3] Montgomery Gas Light Co. *v.* Merrick, 61 Ala. 534; Flash *v.* Paul, 29 Ala. 141; Gunn *v.* Howell, 35 Id. 144; Thompson *v.* Allen, 4 Stew. & Port. 184; Stebbins *v.* Fish, 1 Stew. 180; Parmer *v.* Ballard, 3 Id. 326; Smith *v.* Chapman, 6 Port. 365; Singer *v.* Townsend, 53 Wis. 126, 226; Houston *v.* Wolcott, 1 Iowa, 86; Strong *v.* Hollon, 39 Mich. 411; White *v.* Casey, 25 Tex. 552; Douglass *v.* Neil, 37 Id. 528; Pierce *v.* Carlton, 12 Ill. 358; Allen *v.* Watt, 79 Ill. 284; Cornwell *v.* Hungate, 1 Ind. 156; Scott *v.* Hawkins, 99 Mass. 550; Knights *v.* Paul, 11 Gray, 225; Chambers *v.* McKee, 1 Hill, (S. C.) 229; Lindau *v.* Arnold, 4 Strobhart, 290; Cannaday *v.* Detrick, 63 Ind. 485; Foster *v.* Jones, 15 Mass. 185; Chamberford *v.* Hall, 3 McCord, 345; Erwin *v.* Heath, 50 Miss. 795; Benson *v.* Hollaway, 59 Miss. 358; Kellogg *v.* Freeman, 50 Miss. 157; Saddler *v.* Prairie Lodge, Id. 572; Heffernan *v.* Grymes, 2 Leigh. 512; Atcheson *v.* Smith, 3 B. Mon. 502; Shealey *v.* Toole, 56 Ga. 210; Whitehead *v.* Henderson, 4 Sm. & M. 704; Matheny *v.* Galloway, 12 Id. 475; St. Louis Per. Ins. Co. *v.* Cohen, 9 Mo. 421; Campbell *v.* Nesbitt, 7 Neb. 300; Hanna *v.* Lauring, 10 Martin, (La.) 563; Brode *v.* Firemen's Ins. Co. 8 Rob. (La.) 244; Lee *v.* Parmer, 18 La. 405; Wilson *v.* Burney, 8 Neb. 39; Delby *v.* Tingley, 9 Neb. 412; Lomerson *v.* Hoffman, 4 Zab. 674; Bank of Northern Liberties *v.* Munford, 3 Grant, 232; Gray *v.* Del. & Hudson Canal Co. 5 Abb. N. Cas. 131.

legally entitled to prosecute the action in her own behalf, and when the debt is due to her.[1]

The answers are to be deemed true, unless controverted successfully by the plaintiff upon traverse, whether they are made to interrogatories filed in the main attachment suit, or in an auxiliary proceeding or *scire facias* suit. In either case, if they are such as to warrant the discharge of the garnishee, he cannot be held liable, though the plaintiff may have his remedy afterwards against him in damages if they are subsequently found to have been false, and the plaintiff has suffered loss in consequence.[2] The answers may be not based upon the personal knowledge of the garnishee but may be from information received of such character as to create a belief of the facts. If he is a debtor upon a note not negotiable which he believes, upon information, to have been assigned, so that the transferee has an equitable right to collect it for his own use, though in the name of the payee, the answer so stating would be sufficient to discharge the garnishee—the maker of the note.[3] It would be manifestly unjust to require that the garnishee, under such circumstances, should state the transfer as a fact within his own personal knowledge. Not being a party to the assignment, it cannot be assumed that he has such knowledge.

He knows that he is indebted to some one, and he might be questioned closely with reference to his information concerning the transfer; but with the sworn statement unimpeached that he does not know who is the holder of the note, believes it is not the original payee, and has been so credibly informed, he cannot be charged; for the facts which he states from such information and belief are to be considered as true, like those stated from personal knowledge.[4]

[1] Hirth *v.* Pfeifle, 42 Mich. 31.

[2] Laughran *v.* Kelly, 8 Cush. 199; Carpenter *v.* Gay, 12 R. I. 306.

[3] Clinton National Bank *v.* Bright, 126 Mass. 535; Fay *v.* Sears, 111 Mass. 154; Kingman *v.* Perkins, 105 Mass. 111; Macomber *v.* Doane, 2 Allen, 541; Taylor *v.* Collins, 5 Gray, 50 (note); Foster *v.* Sinkler, 4 Mass. 450. Even when an adverse claimant has appeared, a trustee's answer upon information and belief, must be taken as true and conclusive, in Massachusetts. Clinton Bank *v.* Bright, 126 Mass. 535.

[4] Fay *v.* Sears, 111 Mass. 154; Bostwick *v.* Bass, 99 Mass. 469; Shaw *v.* Bunker, 2 Met. 376; Schafer *v.* Vizena, 30 Minn. 387.

If the garnishee, whether in reply to interrogatories filed in the main attachment proceeding, or in a *scire facias* proceeding ancillary thereto, states that he was induced, by representations fraudulently made to him by the principal defendant to enter into a contract, but that such contract was void by reason of such fraud and that he, the garnishee is not indebted to the defendant, such answer, being not traversed and disproved, should operate the discharge of the garnishee.[1] Should the garnishee admit the validity of a contract with the attachment defendant, but aver the violation of it by the latter, and answer that by reason of such violation, nothing is due to the defendant, the answer must be taken as true, though it may admit that there are funds in the garnishee's hands. Denying that he owes any debt which the defendant can enforce, the garnishee is not chargeable. Where the defendant was a contractor and could have had a sum due him on the contract had he performed his part, but who abandoned the contract, and the other party was obliged to pay others for the work he should have done, such other person, summoned as garnishee, is not liable after answering with a statement of the facts.[2]

Where it is required that the answers must be taken as true and the attaching creditor is inhibited from traversing them, his right to further proof is confined to such additional facts as have not been stated, admitted or denied by the answer.[3] They must be facts not contradictory of the answer, where such rule prevails, but they may so change the legal import of it as to result in the holding of the garnishee liable.

Where the attaching creditor is at liberty to dispute the answer, and contests a statement from information and belief that the debt, which the garnishee admits owing, has been assigned; or that property which he holds has been sold, the supposed assignee or vendee may be made a party in Missouri.[4]

[1] Doyle *v.* Gray, 110 Mass. 206; Fay *v.* Sears, 111 Mass. 154; Bostwick *v.* Bass, 99 Mass. 469.

[2] Doyle *v.* Gray, 110 Mass. 206; Mason *v.* Ambler, 6 Allen, 124.

[3] Bostwick *v.* Bass, 99 Mass. 469. The qualification in the paragraphs above, "unless traversed," is inapplicable of course where contradiction of the answer is not allowed.

[4] Held in Missouri, under statute, that the court, under such circum-

In a disclosure under *scire facias*, though the answer of the garnishee is to be taken as true, it must not be ambiguous and irresponsive to the question. It must always be candid. If the respondent does not know a fact, he may frankly say so, but he must not reply in a doubtful and misleading way. When his knowledge is positive, he must answer positively. All doubtful, unfair, ambiguous and misleading answers should be construed against him.[1] If he knows a fact, he should not qualify his statement by adding that he states it from information received; he should not base his answer upon belief when he has personal knowledge; he should be always impartial between the parties and always honest. The favor to which he is entitled as a disinterested stakeholder will be reversed to his prejudice if he abuse it.

If he has answered a question categorically, the attachment-plaintiff cannot have the interrogatory taken for confessed.[2] The plaintiff should not take a rule for such purpose under such circumstances; but, if the fact sought to be elicited may be reached by additional interrogatories, he may be permitted to propound them without traversing the answers to the first.[3] The garnishee must be given reasonable notice when required to answer in open court.[4]

The maker of an overdue negotiable note payable on demand, who answers as garnishee that he does not know who is the holder, nor who was the holder at the date of the summons, but who makes no statement of any transfer or endorsement, has been held liable, though the result would have been otherwise had the note been payable on time and not overdue. An indorsee, under such circumstances, should have given the maker notice of the indorsement; and, in the absence of such notice, the charging of the garnishee and the payment by him under the order will be a good defense against any subsequent suit by

stances is directed to make an order upon the supposed vendee or assignee to appear and make claim. McKittrick *v.* Clemens, 52 Mo. 160.

[1] Brainard *v.* Shannon, 60 Me. 342.

[2] Ullmeyer *v.* Ehrmann, 24 La. Ann. 32.

[3] Ober *v.* Matthews, 24 La. Ann. 90.

[4] Cockfield *v.* Tourres, 24 La. Ann. 168;

the indorser against the maker.[1] But if the maker, knowing of the existence of an indorsee, should pay him even after having been summoned as garnishee, and should so state in his answer, he ought to be discharged, since he was not, under such circumstances, the debtor of the attachment defendant who was the original payee.[2] It might be a matter of prudence for the maker, under such circumstances, to withhold payment to the indorsee till after his examination, but certainly prudence would not require that he should subject himself to protest.

The garnishee, denying indebtedness, may set up whatever grounds he would have been entitled to plead, had the action been directly brought against him by the person sued in the attachment proceedings.[3] They must be grounds which, at the time of the service of the garnishment, he could have set up against such defendant. If then indebted to him upon contract, the garnishee and defendant could not thereafter rescind the contract so as to cut the attaching creditor off from the benefit of the garnishment and enable the garnishee to plead such rescinding of contract by way of defense.[4]

The garnishee may plead prescription or anything that would be a good defense against the alleged indebtedness were the suit directly brought by his own creditor. He may plead want of consideration. He may plead set off; but if such plea should involve the liquidation of accounts between him and the defendant, it would seem that the investigation ought not be had in the attachment proceeding, and that the garnishment should not be sustained. Proof of set-off, in such proceeding, would not be adduced contradictorily with the defendant; and he would not be bound by the statements of the garnishee nor by the judicial finding thereon, should he afterwards sue for settlement. Of course the defendant is not put to the worse by any acknowledgement of indebtedness to him by the garnishee, nor can he be by any denial thereof; but the investigation of accounts,

[1] Scott *v.* Hawkins, 99 Mass. 550, (under statute.) Knights *v.* Paul, 11 Gray 225.

[2] Kauffman *v.* Jacobs, 49 Iowa, 432.

[3] Sheedy *v.* Second National Bank, 62 Mo. 17.

[4] Fowler *v.* Williamson, 52 Ala. 16.

with one of the parties thereto left out of the inquiry, seems not advisable. However, if the garnishee answers that he owes the defendant a stated sum on account, the attaching creditor may hold him to it. If, on the other hand, he should honestly state that he believes that he is indebted to the defendant on account but that he cannot approximate the amount without a settlement, he ought to be discharged.

Suppose the garnishee should answer that he is indebted now to the defendant but that he holds the note of the defendant to an amount equal to the debt, though the note is not yet due; ought he be ordered to pay into court for the benefit of the attaching creditor?[1] He ought not to be put into a worse position by the summons than he occupied before its service; he ought not be obliged thus to give a fellow creditor a preference over himself, it may plausibly be argued. But the attaching creditor's claim, if already due and owing, is payable now while the note held by the garnishee is not. If the note has some years yet to run, why may not the creditor make the garnishee pay now what the defendant is competent to make him pay now in the absence of the attachment? In case the creditor's claim is not yet due, it would seem that he ought to be given no advantage over the garnishee; nor ought he have any, if the note of the defendant to the garnishee is very nearly due; nor when the order to pay into court would work great hardship; but, unless such or like circumstances are made to appear, there seems to be no protection for the garnishee in the absence of statute exemption in such case.

Contingent liabilities are not chargeable,[2] but the liability must be certain at the time of the service.[3] It must affirmatively appear, from the answer of the garnishee, (and other

[1] In Vermont, under statute, held that he could retain enough to protect himself. Lynde *v.* Watson, 52 Vt. 648.

[2] Cairo &c. R. R. Co. *v.* Killenberg, 82 Ill. 295; Williams *v.* Railroad Co. 36 Me. 210; Wilder *v.* Shea, 13 Bush. 128; Thorp *v.* Elliott, 42 Mich. 511; Spears *v.* Chapman, 43 Mich. 541; Martz *v.* D. & F. M. Ins. Co. 28 Mich. 201; Thorp *v.* Preston, 42 Mich. 511; Nashville *v.* Potomac Ins. Co. 58 Tenn. 296.

[3] Bishop *v.* Young, 17 Wis. 46; Webber *v.* Doran, 70 Me. 140.

proofs where allowable,) that he is liable, or he should be discharged.[1]

One who has paid as garnishee without disclosing the fact, within his knowledge, that the debt had been assigned, may be made to pay again to the assignee.[2]

The garnishee may set off the amount of a claim against the defendant, not negotiable, which he has assigned before being summoned—the assignee agreeing to hold the claim for the benefit of others.[3] If he could plead such claim as a set-off in a suit by the attaching defendant, he can plead it as garnishee; and he is chargeable for the balance of debt only.[4]

Joint contractors, summoned as garnishees, may set off in the attachment proceedings, their separate claims against the defendant.[5]

Offset pleaded in answer against several plaintiffs will not be allowed after the garnishee, without amending his answer, has admitted on trial that the set-off is only against some of the plaintiffs.[6] If there is admission of indebtedness in the answer qualified by the statement that the defendant owes the garnishee a greater sum, the attaching creditor, opposing the allowance of the set-off on the ground that it is not yet due, has the burden of proof.[7] The garnishee cannot successfully plead a prescribed claim as offset.[8]

[1] Richards *v.* Stephenson, 99 Mass. 311; Laughran *v.* Kelly, 8 Cush. 199; Porter *v.* Stevens, 9 Cush. 530; Clinton Nat. Bank *v.* Bright, 126 Mass. 535; Regan *v.* Pac R. R. Co. 21 Mo. 34; Cairo &c. R. R. Co. *v.* Killenberg, 82 Ill. 275; Williams *v.* Housel, 2 Iowa, 154; Smith *v.* Clarke, 9 Iowa, 241; Farwell *v.* Howard, 26 Iowa, 381; Driscoll *v.* Hoyt, 11 Gray, 404; Fay *v.* Sears, 111 Mass. 154; Lorman *v.* Phœnix Ins. Co. 33 Mich 65; Hackley *v.* Kanitz, 39 Mich. 398; Sexton *v.* Amos, Id 695.

[2] Wardle *v.* Briggs, 131 Mass. 518; Whipple *v.* Robbins, 97 Mass. 107; Butler *v.* Mullen, 100 Mass. 453; Randall *v.* Way, 111 Mass. 506; Wilkenson *v.* Hall, 6 Gray, 568; Marsh *v.* Davis, 24 Vt. 363; Seward *v.* Heflin, 20 Vt. 144; Prescott *v.* Hull, 17 Johns. 284; Greentree *v.* Rosenstock, 61 N. Y. 583; Bunker *v.* Gilmore, 40 Me. 88. *See* Landry *v.* Chayret, 58 N. H. 89; Chesley *v.* Coombs, Id. 142.

[3] Nutter *v.* Framingham & Lowell R. R. Co. & Trustee, 132 Mass. 427.

[4] Hathaway *v.* Russell, 16 Mass. 473; Allen *v.* Hall, 5 Met. 263; Green *v.* Nelson, 12 Met. 567.

[5] Hathaway *v.* Russell, 16 Mass. 473; Manuf. Bank *v.* Osgood, 12 Me. 117; Brown *v.* Warren, 43 N. H. 430.

[6] Story *v.* Kemp, 55 Ga. 276.

[7] Cuney *v.* National Bank of Augusta, 53 Ga. 28.

[8] Wadleigh *v.* Jordan, 74 Me. 483.

The garnishee cannot successfully plead that the creditor might have levied upon property in his hands, instead of a credit due the defendant, He must, for his own future protection, defend against any illegal means of making him pay over what belongs to another.[1] He is entitled to damages against both the plaintiff and the bondsmen, for actual loss caused by the groundless issuance of the garnishment, and to exemplary damages if the garnishment is both groundless and vexatious.[2]

If, in defending, the garnishee should claim to be the owner of the thing sought to be subjected to the process of attachment, the question is whether his right is superior to that of the attaching creditor. If he is really the owner, and so answers, and that fact is established, the creditor of the defendant could not maintain the garnishment. But the validity of the garnishee's title to property in his custody when he claims to be the owner, cannot be adjudicated on a rule traversing his answer. Such an issue can only be passed upon in a direct suit.[3]

If the principal defendant is not in court, the garnishee may, in some respects, plead for him; for instance, he may plead exemption in favor of the debtor.[4]

Sec. 6. Amended Answer.

An answer to interrogatories may be amended by the garnishee, upon sufficient cause shown. Sufficient cause is the subsequent discovery of a mistake made in the first response, or the knowledge of some new and important fact, or even newly acquired information concerning his rights under the law touching matters about which his answers are voluntary and will charge him if given but which he is not legally obliged to give. What would subject him to two payments may be recalled by an amended answer. What would bind him and yet was withheld in his first answer, should be given by way of amended answer, for conscience' sake.

When the right of amending is drawn into question, it should

[1] Pounds *v.* Hamner, 57 Ala. 342.
[2] Hays *v.* Anderson, 57 Ala, 374.
[3] Ivens *v.* Ivens, 30 La. Ann. Part I, 249.
[4] Chicago, Rock Island &c. R. R. Co. *v.* Mason, 11 Ill. App. 525.

be remembered that the garnishee's answer is to be more liberally treated than the pleadings of the parties to the main suit. He is no party to that, though a sort of side contest may arise between him and the attaching creditor; certainly he is no party in the fight between the plaintiff and the defendant; he is no intervenor, nor warrantor nor third party of any sort. He cares nothing, or should care nothing, or is legally supposed to care nothing about the issue of the suit. If he has not told all, or has told too much, why should he not be allowed to correct his statement as a witness is so allowed? No court should deny him the right, unless he has forfeited confidence by cunning, trickery, prevarication and question-dodging. Suppose a witness to apply to the court for leave to correct erroneous statements in his testimony: would any tribunal, intent only upon subserving the ends of justice, refuse the request, if made within due time during the process of the investigation, if the witness has proved honest in the first instance but has subsequently discovered an error? Even upon the application of one of the parties to the cause, the court would be likely to allow the witness to be recalled on such a showing: how much more readily should the application of the disinterested witness himself be successful? The analogy of position between the witness and the garnishee is such that the same reasons apply in the one case as in the other for allowing answers to be amended, with the additional one in favor of the latter that the court should protect him from erroneously and innocently causing loss and injury to himself, where the first answers tend to wrong him in that way.[1]

Courts are said to have it in their discretion to allow amendments or not; but it is a discretion under judicial duty—a discretion similar to that which he has in deciding a cause for the one party or for the other. If the garnishee has fully done his duty, and yet has made an erroneous statement which he prays leave to correct, it is the duty of the court to grant the prayer.

In the exercise of discretion, the court may either grant or

[1] Klauber *v.* Wright, 52 Wis. 303.

refuse an application to amend, after a rule has been taken to have the answered interrogatories taken as confessed.[1] But if something has happened subsequently to the original answer which renders it a matter of justice that amendment be allowed, the court should not refuse it. For instance, if the garnishee has answered that he owes on negotiable notes, and afterwards learns that they had been assigned before he was garnished, he cannot be refused the right to amend, if otherwise he would be liable to pay twice.[2] Or, if he has acknowledged indebtedness to the defendant, and afterwards finds that the debt had been assigned before the service of the writ upon him, thus defeating the foreign attachment, he should be allowed to amend as of right.[3]

A second application to amend is entitled to less liberal consideration than the first, though it ought to be granted upon sufficient cause being shown. It is impossible to fix a limit till reasons for amending have been exhausted, except that the reasons should be new ones, and not readily knowable before the previous reply or replies. Common sense will dictate the proper *terminus* in every case.

The effect to be given to the answer, is an important topic. Here is a disinterested third person, called into court against his will, interrogated by the plaintiff, who has made responsive answers to all such legal questions as the plaintiff chose to expound: should his statement not be conclusive? Were he the plaintiff's witness, the plaintiff could not contradict him. Whether his answers be affirmative or negative, the defendant has no interest, nor right, nor business to contradict him. Should not his statement be conclusive upon both parties?

No. He is not a witness. The plaintiff had no option to select whom he might choose to prove the fact that the defendant had money or goods or credits subject to examination. The answers can have no bearing upon the questions at issue in an attachment case. They have no bearing on any litigated ques-

[1] Such application was denied as too late after the garnishee had excepted to a rule to have his first answer taken *pro confesso*. Hennen *v.* Forget, 27 La. Ann. 381.

[2] Lewis *v.* Dunlop, 57 Miss. 130.

[3] Sweet *v.* Read, 12 R. I. 121.

tion between plaintiff and defendant in any case or in any stage of a case. The garnishee is interrogated because he is supposed to owe the defendant or hold property of the defendant—not because he alone knows the fact. He is summoned that he may answer and be held to pay or to deliver, under order of court· not merely to give evidence; and the facts which he divulges are not drawn out by the plaintiff contradictorily with the defendant. While the garnishee, from his own standpoint, may ask to amend erroneous statements on the same grounds that a witness might so ask, yet, from the standpoint of the plaintiff, he is not to be deemed a mere witness. His statements may therefore be traversed by the plaintiff without infringing the rule that inhibits him from contradicting his own witness. The answers are not conclusive upon him, unless he lets them stand unimpeached and uncontradicted. But he may attack them, refute them by evidence *aliunde*, contradict them, explain them, eke them out, prove the liability of the garnishee in spite of his negative replies and hold him responsible for such judgment as he may recover in cases where the proof shows that the garnishee has goods or credits in hand of sufficient amount.

But there are just bounds to collateral investigation of the facts. Courts will not let a new law suit be injected into the one at bar. Evidence *aliunde* will be confined to the question of the garnishee's holding credits or property reachable by execution for the defendant's debt without any impediments pleadable by the garnishee in defense should he be sued for such credits or property by the defendant in the attachment suit. And further confined to this question as laid in the interrogatories. Beyond such bounds, the traverse cannot go.

During a contest between the attaching creditor and another person for funds in the hands of the garnishee, they should not be paid to either contestant till the dispute has been decided.[1] The garnishee cannot pay them to an assignee of the defendant, at a time when proceedings are pending by the attaching creditor against such assignee, for the judicial settlement of such contest, if the garnishee has knowledge of such proceedings. A

[1] Saller *v.* Ins. Co. of N. America, 62 Ala. 221.

payment to the transferee of the defendant, under such circumstances, would be at the peril of the garnishee.[1] If he is not informed of the transfer till after he has been summoned, but before he has answered, he should disclose his knowledge of it in his answer;[2] but if, before being informed, he has acknowledged indebtedness to the defendant in his answer, made in good faith, he ought not be imperilled. He should be allowed to amend his answer, should he obtain information of the transfer before being ordered to pay under the garnishment.[3] If, under such circumstances, he does not amend after he has knowledge, he will not relieve himself from liability to the assignee.[4]

Sec. 7. Traverse of the Answer.

The answer is final when not traversed and disproved.[5] Denial of indebtedness to the defendant and of possessing property of his, will result in the discharge of the garnishee when not controverted; but the defendant cannot ask the discharge upon such denial, for the plaintiff may desire to traverse the answer.[6]

The rule is that it must clearly appear by the untraversed answer that the garnishee is chargeable, or he will be discharged.[7] And the discharge is final.[8] The rule has been held to include statements of facts made on the garnishee's belief

[1] *Id.* Larabee *v.* Knight, 69 Me. 320.

[2] Tabor *v.* Van Vranen, 39 Mich. 793.

[3] Tracy *v.* McGarty, 12 R. I. 168. A railroad company was held liable on account of admitted indebtedness to a judgment debtor, though the corporation was chartered in another State, and denied the jurisdiction of the court in which it was garnisheed. Mahanny *v.* Kephart, 15 W. Va. 609.

[4] Lewis *v.* Dunlop, 57 Miss. 130.

[5] Flash *v.* Morris, 27 La. Ann. 93; Wilder *v.* Shea, 13 Bush, 128.

[6] Railroad *v.* Peoples, 31 Ohio St. 537; Myers *v.* Smith, 29 Ohio St. 120. This case makes the exception however that, the garnishee may be discharged on application of a defendant who "has given an undertaking for the performance of any judgment which may recover against him."

[7] Cairo &c. R. R. Co. *v.* Killenberg, 82 Ill. 295; Wilder *v.* Shea, 13 Bush, 128; Nashville *v.* Potomac Ins. Co. 58 Tenn. 296.

[8] Turpin *v.* Coates, 12 Neb. 321; Wilder *v.* Shea, 13 Bush, 128.

and on information which he has received from others, as well as those based on his own personal knowledge.[1]

A plaintiff may have an action against a garnishee who has wronged him by an insufficient answer,[2] but the proper course is to traverse the answer in the proceeding in which it was rendered. In Louisiana, the traverse must be within a limited time fixed by statute, or the right will be prescribed.[3]

A demurrer may be properly pleaded to the answer of the garnishee that the defendant has failed and his effects have gone into the hands of a receiver.[4] It does not matter to the garnishee whether his indebtedness is payable to his creditor or to a receiver. There may be circumstances, however, under which it would be his duty to disclose the fact that a receiver had been appointed. If he has had legal notice of such an appointment so as to preclude his payment to his creditor, and the proceedings of which he has notice are pending in a different county, and those in which he is garnished are of such character that he may be speedily ordered to pay into court, (as in case of confession of judgment by the principal defendant,) he might be in danger of being made to pay twice, if, after notice of the appointment of the receiver, he should fail to disclose the fact, and acknowledge indebtedness in his answer without explanation. Under such circumstances, such disclosure ought not be subject to exception.

However insufficient the answer, it cannot be stricken from the record on motion. The proper way to meet it is by exception or traverse.[5]

Wherever traverse of the garnishee's answer is not permitted, there is danger of great difficulties and impediments to justice.

[1] Sexton *v.* Amos, 39 Mich. 695; Fay *v.* Sears, 111 Mass. 154; Bostwick *v.* Bass, 99 Id. 469; Crossman *v.* Crossman, 21 Pick. 21; Shaw *v.* Bunker, 2 Met. (Mass.) 376; Clinton National Bank *v.* Bright, 126 Mass. 535.

[2] Exchange Bank *v.* Gulick, 24 Kan. 359; Laughran *v.* Kelly, 8 Cush. 199.

[3] Garcia & Leon *v.* La. Mut. Ins. Co. 31 La. Ann. 546.

[4] Bartlett *v.* Wilbur, 53 Md. 485.

[5] Burrus *v.* Moore, 63 Ga. 405; Security Loan Association *v.* Weems, 69 Ala. 584, relative to insufficient answer.

The answer may be one easily exposible by other testimony, yet of such facial character that the court would not be justifiable in rejecting it as false when weighing it with reference to its credibility. It might be noncommittal, so as to make out no case for the plaintiff; and then he would be without recourse, but for the right to require responsive answers when the ones offered are evasive.[1] If the disclosure is not satisfactory, the only authorized course, where traverse is not permitted, is to obtain a further disclosure.[2]

If the plaintiff neither traverses the answer nor files additional interrogatories, it must stand as true, as far as it is responsive; and sometimes when it goes farther and affirms new matter. Indeed, new matter by way of exoneration will generally be held as true unless the plaintiff controvert it.[3] He has, of course, much latitude in the traverse of such new matter. In such case, the *onus* is wholly on the plaintiff to establish the indebtedness of the garnishee to the defendant.[4]

Whenever the attaching creditor may legally traverse the answer of the garnishee, he may, as a matter of course, introduce evidence *aliunde*.[5] Such evidence must be confined to

[1] In Hackley *v.* Kanitz, 39 Mich. 393, the court said: "The disclosure is so ambiguous and uncertain that it would not authorize the justice to render judgment against Kanitz as garnishee. * * The disclosure is the evidence, and all the evidence that can be introduced in the case, and if that does not *prima facie* show a liability upon which judgment could be rendered, the justice has no authority to render a judgment against the garnishee, *etc.* This has been repeatedly held in this State, and must be considered as settled." Newell *v.* Blair, 7 Mich. 103; Thomas *v.* Sprague, 12 Id. 120; Watson *v.* Kane, 31 Id. 63. But, under Mich. stat., the garnishee may make an issue, and the subject and facts of his disclosure may be canvassed, met by counter testimony, *etc.* Fearey *v.* Cummings, 41 Mich. 376.

[2] The People *ex rel.* Townsend & Alexander *v.* Cass Circuit Judge, 39 Mich. 407.

[3] Holton *v.* South Pac. R. R. Co. 50 Mo. 151; Thompson *v.* Fischesser, 45 Ga. 369.

[4] In Rhode Island, a creditor cannot supplement a garnishee's affidavit by extrinsic testimony and recover partly on the one and partly on the other. Sweet *v.* Read, 12 R. I. 121.

[5] Leighton *v.* Heagerty, 21 Minn. 42; Bates *v.* Forsyth, 64 Ga. 232; Baxter *v.* Mo. &c. R. R. Co. 67 Barb. 283; McNeal *v.* Roach, 49 Miss. 436; Rutter *v.* Boyd, 3 Abb. New. Cas. 66; East Line &c. R. R. Co. *v.* Ter-

the real issue. The attaching creditor cannot prove against the garnishee who is a grantee, a verbal promise, (exacted by the defendant as grantor as the condition of the conveyance,) to pay such creditor's claim in full, when the instrument of conveyance recites, as consideration, the grantee's promise to pay all the creditors of the grantor in equal proportion.[1]

To successfully reach a fund in the hands of a garnishee, the attaching creditor must have the admission in the answer that it belongs to the defendant;[2] or if, in the absence of such admission, he may offer proof *aliunde*, the burden is on him to make out his case.[3]

The burden of proof is upon the attaching creditor when he seeks to establish, by evidence, any state of facts different from that disclosed by the garnishee, for the purpose of sustaining the garnishment;[4] but it may be readily shifted. The question of the burden of proof depends upon the same principles as in an ordinary contest, except that the garnishee's position should be liberally treated because of his absence of interest.[5] The general rule is that the sworn answer of the garnishee shall stand as true and conclusive till successfully controverted; and, when by statutory law it is provided that it shall so stand, still

ry, 50 Tex. 129; Farrar *v.* Bates, 55 Tex. 193; Hewitt *v.* Wagar Lumber Co. 38 Mich. 701.

[1] Murphy *v.* Caldwell, 50 Ala. 461.

[2] Farwell *v.* Howard, 26 Iowa, 381; Morse *v.* Marshall, 22 Id. 292; Church *v.* Simpson, 25 Id. 410; Pierce *v.* Carlton, 12 Ill. 358; Chase *v.* North, 4 Minn, 381; Cairo &c. R. R. Co. *v.* Killenberg, 82 Ill. 295; Banning *v.* Sibley, 3 Minn. 389; Pioneer Printing Co. *v.* Sanborn, 3 Minn. 413; Alleghany Savings Bank *v.* Meyer, 59 Pa. St. 361; Williams *v.* Jones, 42 Miss. 270; Lorman *v.* Phœnix Ins. Co. 33 Mich. 67; Fisk *v.* Weston, 5 Me. 410.

[3] Hewitt *v.* Wagar Lumber Co. 38 Mich. 701; McNeill *v.* Roache, 49 Miss. 436.

[4] Caldwell *v.* Coates, 78 Pa. St 312; East Line &c. R. R. Co. *v.* Terry, 50 Tex. 129; Bates *v.* Forsyth, 64 Ga. 232; Sheldon *v.* Hinton, 6 Ill. App. 216.

[5] East Line &c. R. R. Co. *v.* Terry, 50 Tex. 129; Porter *v.* Stevens, 9 Cush. 530; Lane *v.* Felt, 7 Gray, 491; Laschear *v.* White, 88 Ill. 43; Driscoll *v.* Hoyt, 11 Gray, 404; Richards *v.* Stephenson, 99 Mass. 311; Sheldon *v.* Hinton, 6 Ill. App. 216; Lomerson *v.* Huffman, 1 Dutcher, 625; Rowland *v.* Plummer, 50 Ala. 182; Hunt *v.* Coon, 9 Ind. 537; Williams *v.* Housel, 2 Iowa, 154; Farwell *v.* Howard, 26 Iowa, 381; Reagan *v.* Pac. R. R. Co. 21 Mi. 30; Karnes *v.* Pritchard, 36 Mi. 135.

the general rules of evidence remain applicable.[1] Should the garnishee plead *nulla bona*, the burden of proof would be on the plaintiff,[2] if allowed to traverse such answer. If the garnishee admits indebtedness to the defendant yet states that the latter owes him a greater sum, and the plaintiff traverses the answer and alleges that the debt of the defendant to the garnishee is not due and therefore not a good offset, the burden is then upon the plaintiff to prove such allegation.[3]

The presumption is not in favor of the plaintiff in a question between him and the garnishee whether the latter has assets of defendant in hand. The *onus* is upon the plaintiff.[4] He has the affirmative of the question, and the presumption favors the negative. He may probe the conscience of the garnishee; he may traverse the answers to the interrogatories, but he must establish the fact which he alleges. If in answer to the categorical question, "Have you assets of the defendant in your possession, or credits due him, liable to execution upon judgment against him?" the garnishee should simply answer "No," he should be discharged, in the absence of evidence *aliunde*. In such case, the answer discloses not only sufficient reason but the best reason possible for the discharge.[5]

When the answer admits that there were attachable funds in the hands of the garnishee at a date prior to the service of the process upon him, he must show positively that he did not still hold them at the time of the service. If he states that he

[1] Kelley *v.* Weymouth, 68 Me. 197; Feary *v.* Cummings 41 Mich. 376.

[2] Caldwell *v.* Coates, 78 Pa. St. 312.

[3] Cuny *v.* The National Bank of Augusta, 53 Ga. 28.

[4] Rowland *v.* Plummer, 50 Ala. 182; Hutchins *v.* Hawley, 9 Vt. 295; Hoyt *v.* Swift, 13 Vt. 129; Cairo & St. Louis R. R. Co. *v.* Killenberg, 92 Ill. 142; Rippen *v.* Schoen, 92 Ill. 229; Sheldon *v.* Hinton, 6 Ill. App. 216; Wilhelmi *v.* Haffner, 52 Ill. 222; Haven *v.* Wentworth, 2 N. H. 93; Adams *v.* Barrett, 2 N. H. 374; Piper *v.* Piper, 2 N. H. 439; Greenleaf *v.* Perrin, 8 N. H. 273; Paul *v.* Paul, 10 N. H. 117; Getchell *v.* Chase, 37 N. H. 106.

[5] It was held in Alabama that a garnishee claiming ownership by transfer from a transferee is bound to prove both transfers, and to show that the first transfer was made prior to the service of the garnishment, for a valuable consideration, or, if not founded on such consideration, that he, for value, accepted a transfer from the original transferee. Winslow *v.* Bracken, 57 Ala. 368.

had expended such funds, before the service, for the defendant's benefit, he may, in case his answer is traversed, be required to show specifically in what manner and for what particular purposes the expenditure was made. It must be such a disbursement as would prove a good defense were he sued by the defendant in the attachment suit. The *onus* is upon him when the plaintiff has taken issue upon the answer, after the admission that he held such funds at a period immediately, or within a few weeks or even months, preceding the service of the writ.[1] It is true that the garnishee is, in some sense, the attaching plaintiff's witness; and, so far as the defendant is concerned, an ambiguous answer to interrogatories is not sufficient. The plaintiff must make out his case before he can subject the defendant's credit to the payment of his claim.[2] By traversing the answer, however, as above remarked, the plaintiff may throw the burden of proof upon the garnishee under some circumstances.

When the question is whether an assignment by the defendant to the garnishee was made in good faith and for a valid consideration, if the garnishee claims to hold in his own right by virtue of such assignment, the plaintiff may offer evidence to prove that the claimant knew of the claim of the plaintiff against the defendant, and of the effort to reach the fund in the garnishee's hands.[3]

The *onus* is on the garnishee to sustain an answer that property held by him is held subject to trust, when such answer is traversed.[4] In a contest with the plaintiff, the answer of the garnishee is not evidence on the trial of the issue whether the latter had property in his possession subject to attachment, when he was summoned.[5]

When the plaintiff is allowed to traverse the answer of the garnishee and to contradict it by other testimony, the latter has an interest in the contest and that gives him the right to meet

[1] Barker *v.* Osborne, 71 Me. 69.

[2] Spears *v.* Chapman, 43 Mich. 541.

[3] Sullivan *v.* Langley, 124 Mass. 264.

[4] Frank *v.* Frank, 6 Mo. App. 589.

[5] Cushing *v.* Laird, 6 Ben. 408.

and refute such testimony by counter evidence. There would be no justice in a proceeding tending directly to charge him with liability unless he be allowed thus to resist it. His interest, and therefore his right, is confined to his own protection from the danger of being obliged to pay twice, if he is indebted; but, if he is not indebted, his interest and the correlative right give him the position of a resistant against the danger of being condemned to pay once. Here there is a suit within a suit; a contest within a contest; and it is manifest that it should be confined within the narrowest bounds consistent with justice to all the parties. The defendant in the attachment suit, who looks on without participating in the incidental contest, sees his business relation with his agent or alleged debtor undergoing judicial investigation, and gathers items that may subserve his purpose in case the same questions should arise in any subsequent suit by him against the third person summoned now as garnishee. What an anomalous state of things is here presented, if the whole subject of complicated accounts and protracted and multifarious transactions are to be examined with one of the contradicting parties silent while the other is virtually on trial! There must be close limits assigned to such a side investigation. Whatever would require a lawsuit between the garnishee and his creditor for elucidation, ought not here be drawn into question. Whatever is certainly owing and liable now or hereafter to execution, without any conditions, should alone be the subject of evidence *aliunde*. The garnishee's unsuspicious statements should stand unless they can be clearly contradicted without involving the grounds of a litigious contest. The garnishee ought not be incidentally forced into a long, complicated defense of himself against the defendant by an attack of the plaintiff through the defendant, in an attachment suit, when there yet has been no judgment against the defendant, and the lien arising by seizure has not been perfected. The right and interest of the attaching creditor would not necessarily be wholly lost should the garnishee be discharged, since he might yet, in case he gained judgment against the defendant, levy in execution upon property in

the third person's hands, if he can make out the requisite facts at that stage.

If, pending the attachment suit, the plaintiff should be allowed unlimited scope in traversing the garnishee's answers, there would be no end to the litigation. All persons interested ought to be allowed to intervene, and there would be confusion worse confounded. Certainly the inquiry should not go beyond the question whether or not the garnishee's answers are true with the view of deciding upon his immediate liability free from all contingencies whatever.

When there is a contest between the attaching creditor and the garnishee, the proceedings had against the principal defendant are the basis of the auxiliary issue, and are before the court to be taken note of without being offered in evidence. This is palpable where the contest with the garnishee is in the general suit, under the case entitled by the name of the attaching creditor against the defendant; but, though not so readily apparent, it is equally true when the auxiliary issue is made in a separate proceeding—by the plaintiff in the attachment suit against the garnishee. In such minor proceeding, the court may inspect the record of the major case; and the reason is that the issue against the garnishee depends on the state of the principal proceeding. The two records are connected by the absolutely necessary allegations in the second, showing the first to be the basis upon which the garnishee is sued. No proof of the first record is necessary,[1] unless it is brought from another court, when it should be identified; or from another State, when it should be properly authenticated.

After the interrogatories and summons have been issued, if the garnishee pay the defendant before he is served, especially if he is ignorant of the issue of the garnishment, he will not be liable as garnishee.[2] Even if the notice has been left at his residence, payment without knowledge of it will acquit him of obligation to defendant and therefore of liability to the attach-

[1] Farrington *v.* Sexton, 43 Mich. 454: "The whole record is connected, and it would be a vain and useless ceremony to introduce proof separately when it is all necessarily together before the same tribunal." Strong *v.* Hollon, 39 Mich. 411.

[2] Landry *v.* Chayret, 58 N. H. 89.

ing creditor. If a co-obligor pay the debt, it will be settled as to the garnishee, and he will be exempt from liability, provided the co-obligor knew nothing of the issuance of the garnishment; though, if service has been made, both co-debtors might be presumed to know of it and to be estopped from making payment to the defendant.[1] Generally, where a clerk or employee, authorized to pay for his principal, settles a debt in due course of business without knowledge of the garnishment of the principal, without any collusion on the part of the principal, and under such circumstances that the principal could not have countermanded the agent's general authority to pay by reason of distance, want of time or some other good cause, the garnishee ought not be held. Especially if the principal is a corporation which must necessarily act through agents, should it be held harmless if a paying officer has discharged an obligation before it was practicable for the officer served with the process to communicate with such disbursing officer.

The burden of proof in any such case would be upon the garnishee to show good faith and absence of any intention to side with the defendant rather than with the plaintiff in making the payment, and ignorance on the part of the person actually settling the debt, of the fact of the service upon the principal, and want of opportunity by the latter to inform the agent.

When the garnishee is already sued for the sum he owes, he ought not to be held; for the person issuing the garnishment can better attain his end by seizing the right of the plaintiff in the suit against the garnishee. However, if the garnishment can be pleaded in bar of the action, under statutory provision, the garnishee would not be liable to a second payment, and the garnishment may be maintained. Even then, however, the summons must be made in time to enable the garnishee to defend the action against him by such plea, as it would be too late after judgment rendered. He could not plead such summons in arrest of judgment.

If indebted when served with garnishment process, he can-

[1] Storm *v.* Cotzhausen, 38 Wis. 139.

not be discharged by pleading payment of a judgment afterwards rendered against him for his debt.

A garnishee who has admitted a sum to be due the defendant, may have judgment entered against him accordingly, though it became due after the defendant had filed his plea.[1] But if he answers that the defendant has sold what he holds, or a part thereof, he will not be liable for what was sold before the service of the interrogatories, even though such sale be subsequently set aside as fraudulent.[2] Doubtless he might be reached by garnishment after a final judgment setting aside such sale, if the property should still be in his possession. It will, of course, be understood that the answer setting up the sale must be made in good faith, and not shaken by traverse, in order to relieve the garnishee of liability in such case.

Should the garnishee admit indebtedness to the defendant yet disclose the fact that the indebtedness was for property he had bought of the defendant and that the latter held a lien upon the property for its payment and had filed a bill to enforce the lien to an amount as great or greater than the sum claimed by the attaching creditor upon which the garnishment was issued, it has been held that he ought not to have judgment rendered against him as garnishee.[3]

A garnishee may answer that he owes the defendant, and his answer may be true; but if the defendant is the agent of a principal, the latter may successfully claim the fund. The garnishee may have done business with the defendant and come under obligations to him, without knowing that the latter was acting in the capacity of agent for another. He may be liable to a suit for the enforcement of such obligations. But the agent's right to sue is derived from the principal; and that right continues only during the principal's pleasure. The garnishee may be sued by the agent's principal, whose right is superior to that of the agent. And, in an attachment proceeding, after the garnishee has answered that he owes the defend-

[1] Mullen *v.* Maguire, 10 Phila. 435.

[2] Meyer *v.* Deffarge, 30 La. An. Part I. 548.

[3] Vertrees *v.* Hicks, 4 Bax. 380.

ant, the principal of that defendant may claim the debt; and upon the establishment of the fact that the garnishee owes the defendant who is the agent of the claimant, he will be entitled to have the attachment set aside.[1]

Sec. 8. Charging-Order, Interest and Costs.

The only judgment that can be rendered against the garnishee, at this stage of the proceedings, before there has been any rendered against the principal defendant and the property attached or subjected to garnishment, must necessarily be merely interlocutory. Being subsidiary to the main decree, it cannot possibly possess finality before that shall have been rendered. No final judgment, except one in favor of the garnishee, pronouncing his discharge, can be rendered in the side suit, until the principal suit shall have been prosecuted to its termination, and that termination must be favorable to the attaching creditor if he is to have final judgment and execution against the garnishee.

When the garnishee owes the defendant a debt bearing interest, he is liable for the interest unless prevented from paying the debt by the garnishment. If he has attachable funds in his hands which he has put at interest he is liable for what they yield. If he has property attachable, he is responsible for its fruits which he gathers after notice. If he uses what is attached in his hands in his general business so that it is not distinguishable from his own property or funds, he should account for its usufruct, if practicable, or pay legal interest on the amount or value.

The fact of his being in receipt of interest from money, or usufruct from property attached in his hands, or in the enjoyment of an interest bearing obligation, must be made to appear, by his answers or otherwise, to render him chargeable for interest or fruits. His contract with the defendant, the note which he has given, the character of their relation of debtor and creditor under the law and the usages of business, generally enable

[1] Sheehan *v.* Marston & Trustee, 132 Mass. 161.

the court to see whether it is just to charge the honestly-answering garnishee beyond the property attached or the principal sum arrested in his hands.

Interest is chargeable against the shirking or falsely-answering garnishee who makes delay in the collection of the debt adjudged to be due the plaintiff by colluding with the defendant or otherwise in any fraudulent way. If he risks, in ventures of his own, money attached under such circumstances that it ought to be held by him as a mere custodian, he is liable to legal interest and ought to account for any benefit accruing by the illegal venture.

Whenever the defendant would have been entitled to interest had no attachment been laid, the plaintiff in a successful attachment suit will be so entitled, so far as interest is due at the date of the summons; and he will be entitled to such interest as may thereafter accrue. Of course, none can thereafter accrue if the arrest in the hands of the garnishee stops interest from running by locking up the funds in his hands as a mere holder of a stake, and the garnishee derives no benefit by using what is legally thus withheld from use.

Notes not matured, bearing interest from date, acknowledged by the garnishee to have been given by him to the defendant and to be of an unnegotiable character, and to be still in the defendant's hands since no notice of transfer has been given, continue to bear interest after the summons of garnishment just as before, and the interest becomes part of the ever-growing debt and is subject to the attachment like the principal.

When the garnishee is ready to pay the defendant what he owes, ready to pay it over to the plaintiff whenever ordered to do so by the court, is restrained from using what he holds and from deriving any benefit by the holding and is an honest and fair-dealing respondent to interrogatories, he is not chargeable with interest. When the note he has given, or the contract he has made, or the obligation he has in any way incurred, is not interest-bearing, it cannot be made of different character by the mere act of attaching it.

The garnishee is not supposed to make any use of the money in his hands from the time of summons to the time when he

pays it into court under order, and therefore he owes no interest for such time. Whatever it is his duty to do he must be presumed to do. Unless such presumption is rebutted, he cannot be required to pay interest on funds thus held. There is an exception to this presumption when the money ought to be deposited in court when attached, but is held by the garnishee till after final judgment against the defendant and till an order of court for the paying over of the funds subjected to garnishment. And in case the garnishee has denied the possession of funds in his hands, and such possession has been established by evidence *aliunde*, there will be no presumption that he held the funds without using them from the time of summons till the payment into court under order.

Interest by way of damage caused by the acts or omissions of the defendant, are not chargeable against the garnishee. The latter is chargeable for the interest which he has received, and also for such as he has obligated himself to pay.[1] A garnishee under a void process is not relieved from paying interest on money in his hands to whom it is due; especially when it does not appear that such money has been set apart to answer the summons.[2]

It is a hard case for an innocent and frank-answering garnishee, totally disinterested in the litigation as he is, to be mulct in costs. Yet, if his denial is traversed, and witnesses *pro* and *con* brought in, and continuances follow, and commissions issue, and a protracted contest between him and the plaintiff ensue, (which he is obliged to encounter or suffer wrong,) and finally he be adjudged liable as garnishee, the costs may exceed the fund in hand. The hardship in any such case clearly appears upon the reflection that he had no agency whatever in provoking the litigation, no chance whatever of being benefitted by it in any event, and was driven to defend himself by way of protection from being wronged. The fact that he is finally adjudged liable is no justification of the hardship; for, to say nothing of his loss of time and of the inestimable annoyance

[1] Abbott *v.* Stinchfield, 71 Me. 213; Smith *v.* Flanders, 129 Mass. 322.

[2] Hawkins *v.* Ga. Bank, 61 Ga. 106.

he has suffered, he is mulct in costs for no fault of his, even though the court condemn him to pay; for he had the undoubted right to defend himself.

It is different, so far as concerns the hardship, when the garnishee causes the traverse, protracted litigation and increased costs by his own fraud, crookedness, collusion with defendant and other reprehensible courses. In such case, if finally found chargeable, costs are not too much of a punishment for him.

Where the property or credit subjected to garnishment proves sufficient to pay both debt and costs, the garnishee's costs may be covered by it, as usually they are. It is but just to tax a reasonable fee for the garnishee's counsel, to be paid with the rest of the costs out of the seized and subjected property. The nice questions of jurisdiction which are frequently involved in attachment suits render counsel indispensable to the safety of the garnishee in making payments under orders of court.

The rule is settled that the garnishee is not personally liable to costs when he acknowledges indebtedness or possession of the defendant's property and does not resist the garnishment.[1] No judgment can be rendered against him beyond the amount in his hands, either for principal or costs. On the other hand, the rule is pretty general that he is liable to costs when a contest ensues between him and the attaching creditor upon his denial of having property or credits of the defendant subject to execution, if he fails in such contest.[2] So, also, if he does not respond to the interrogatories, fails to meet them fairly, or neglects them altogether.

So long as the litigation is confined to the proper parties, the third person questioned cannot be put in a worse position than he was before the summons by being required to pay the costs of the proceeding which brought him into court on other people's business. The reason of his liability for costs, in the instances above maintained, is that he himself needlessly provokes much greater costs by contesting his own liability than would otherwise arise;[3] but the reason seems not well founded, for he would

[1] Johnson *v.* Delbridge, 35 Mich. 436; Zimmer *v.* Davis, Id. 39.

[2] Strong *v.* Hollon, 39 Mich. 411.

[3] Lucas *v.* Campbell, 88 Ill. 447.

never have given rise to such further costs had he been let alone. He is not the original instigator of the contest between himself and the attaching creditor. He tries to protect himself, without possible further benefit.

The garnishee who has not made an issue is entitled to costs.[1] He is as much entitled as a mere witness;[2] and when the character of litigant is forced upon him, the court ought to allow him reasonable costs. Always when the judgment is in his favor, after his litigation upon an issue, he is entitled to his costs. And when it is against him, the court may award him costs,[3] for it may be no fault of his, but rather a duty, to test the question of his liability, under many conceivable circumstances. Costs were allowed to a garnishee, who was summoned and who appeared and answered, though meanwhile the case had been abandoned by the plaintiff.[4]

It was held that the costs of the attachment proceedings should be paid out of the fund brought into court by the garnishee who was indebted not only to the defendant but also to the interpleaders.[5]

The garnishee is entitled to discharge and to an allowance of his costs, where there has been an abuse of process, undue delay in bringing in the principal defendant, or other injurious acts or laches of the attaching creditor.[6] But if he has answered denying indebtedness and is troubled no further, he would not be entitled to any costs at subsequent terms of court with the case still pending, though the defendant does not appear to protect himself.[7] If the case requires attention, however, in order to prevent a wrongful order on such answer, and the garnishee is obliged to keep counsel employed to protect his rights, he ought to be allowed costs and attorney's fees

[1] Cuny *v.* National Bank of Augusta, 53 Ga. 28; Hammett *v.* Morris, 55 Ga. 644. See Selz *v.* Atkinson Bank, 55 Wis. 225.

[2] Washburn *v.* Clarkson, 123 Mass. 319.

[3] Strong *v.* Hollon, 39 Mich. 411.

[4] Duffee *v.* Call, 123 Mass. 318; Brown *v.* Seymour, 1 Pick. 32.

[5] Baker *v.* Lancashire Ins. Co. 52 Wis. 193.

[6] Noble *v.* Bourke, 44 Mich. 193.

[7] Hawkins *v.* Graham, 128 Mass. 20.

in such subsequent terms. But such allowances, when not authorized by statute, are within the discretion of the court.[1]

Where there is a rule to show cause why judgment should not be rendered against the garnishee, a failure of the plaintiff-in-rule to appear at the time appointed for its hearing is good ground for a motion by the garnishee that the garnishment be discontinued or the plaintiff-in-rule non-suited.[2] And if, after the garnishee has been discharged under such circumstances, the defendant should assign his property, the subsequent appearance of the plaintiff and the garnishee could not affect the vested rights of the assignee; and this would be true, though the assignment be made on the same day as the writ of garnishment.[3] If the plaintiff commits *laches* by delaying unreasonably to take the garnishee's deposition, the latter may be discharged;[4] so also if he fails to bring the principal defendant into court by reason of his own *laches*.[5] When the garnishee is discharged, the costs fall on the plaintiff; when charged, upon the defendant or the property or fund attached, if there is final judgment for the plaintiff.

[1] Ib.

[2] Wilcox *v.* Clement, 4 Den. 162; McCarty *v.* McPherson, 11 Johns. 407; Skufelt *v.* Cramer, 20 Johns. 309; Barber *v.* Parker, 11 Wend. 52; Stadler *v.* Moors, 9 Mich. 264; Redman *v.* White, 25 Mich. 526; Brady *v.* Tabor, 29 Mich. 199. In Mich., judgment of non-suit must be entered if plaintiff fail to appear. Johnson *v.* Dexter, 38 Mich. 695.

[3] Johnson *v.* Dexter, 38 Mich. 695.

[4] Demeritt *v.* Estes, 56 N. H. 313.

[5] Noble *v.* Bourke, 44 Mich. 193.

CHAPTER XII.

THE DEBTOR APPEARING AND BONDING.

§ 1. Special Appearance.
2. General Appearance.
3. Withdrawal of Attorneys—its Effect on Previous Appearance.
§ 4. The Forthcoming Bond.
5. The Bond to Dissolve—its Effect.
5. The Bond to Dissolve—Surety.

Sec. 1. Special Appearance.

The law governing the appearance of the defendant in attachment suits is much the same as in other classes of cases, and therefore authorities on the subject may be properly drawn from decisions upon the general practice as well as from those concerning the distinct subject of this treatise.

Appearance is either special or general.

Special appearance is the coming of the defendant into court and making entry on the record of the purpose for which he appears, which must be something less than defending the suit upon its merits. Whether previously served with summons or not; whether a publication notice has been made or not, the defendant may voluntarily appear either specially or generally.

The usual purposes of special appearance are to quash the proceedings for irregularities patent upon the record, to except to the jurisdiction, and even to set aside judgments rendered by default or otherwise on the ground of want of jurisdiction.

The advantage of a special appearance to the defendant is in the opportunity which it gives him to object *in limine* to irregularities without being prejudiced in consequence when he comes to answer to the merits. He may succeed thus in defeating the action at its threshold; but, if unsuccessful, he may either stay out of court and risk the almost certain result of being defaulted, or he may regularly appear and defend upon the merits, reserv-

ing the questions previously overruled when they concern jurisdiction, (except such jurisdictional matters as are waived by answer,) or when the practice of his State allows such reservation of other points decided *in limine*.

He is not deemed a personal party to the suit by reason of his special entry of record for any of the purposes above mentioned, if he confines himself to them in his motion. For instance, he may move to quash for reasons apparent on the face of the papers without subjecting himself to all the consequences of becoming a party to the suit to which he may not even have been summoned or notified; or, if summoned, to which he has not responded as a party by coming unconditionally into court.[1] By such appearance, he does not assent to, or cure, any want or defect of summon or other errors of the proceeding.[2] Even if the defendant makes a special appearance to appeal the case, he thus makes no waiver of objection to the service.[3]

When the defendant appears to object to the jurisdiction because he was not served, or not properly served, he cannot be held as thereby responding to the summons and submitting to the jurisdiction;[4] but if he appears to object to the jurisdiction on other grounds than want of summons, there is a waiver as to the summons.[5] Unless the record shows that the defendant means to confine himself to the question of jurisdiction, he will be deemed in court for general purposes when he pleads to the jurisdiction;[6] but an unserved defendant may, with proper reservation entered, specially appear and even move to set a

[1] Lane *v.* Leech, 44 Mich. 163; Bushey *v.* Raths, 45 Mich. 181; Loring *v.* Wittich, 16 Fla. 617; Johnson *v.* Buell, 26 Ill. 66; Blackwood *v.* Jones, 27 Wis. 498; Pry *v.* Hannibal & St. Jo. R. R. Co. 73 Mo. 123; Evans *v.* King, 7 Mo. 411; Whiting *v.* Budd, 5 Mo. 443; Moore *v.* Dickerson, 44 Ala. 485; Bonner *v.* Brown, 10 La. Ann. 334; Crary *v.* Barber, 1 Col. 172; Manice *v.* Gould, 1 Abb. Pr. (N. S.) 255.

[2] Rodolph *v.* Mayer, 1 Wash. Ter. 154; Stanley *v.* Arnow, 13 Fla. 361; National Furnace Co. *v.* Mobile Iron Works, 18 Fed. Rep. 863.

[3] Martin *v.* Thierry, 29 La. Ann. 362.

[4] Lee *v.* O'Shannessy, 20 Minn. 173; Covert *v.* Clark, 23 Minn. 539; Michels *v.* Stork, 44 Mich. 2; Cedar Hill &c. Mining Co. *v.* Jacob Little, &c. Mining Co. 15 Nev. 302; Murphy *v.* Ames, 1 Montana, 277; Potomac Steamboat Co. *v.* Clyde, 51 Md. 174; Heffner *v.* Gunz, 29 Minn. 108.

[5] Church *v.* Crossman, 49 Iowa, 444.

[6] Aultman *v.* Stinan, 8 Neb. 109.

default aside without rendering himself liable to the rendition of a final personal judgment against him.[1] For, the object is to correct the error of pronouncing default without citation, and "it can hardly be claimed that by making the objection he cures the very defect complained of."[2] Objection for want of service is exception to jurisdiction; and the defendant may afterwards plead to the merits without prejudice. The objection is waived only when he so pleads in the first instance without insisting on the absence or illegality of service.[3] Though he should specially appear after judgment and move to strike the case from the docket for want of service, he would not thus cure defects nor make the void decree a valid one;[4] but the result has been held to be otherwise upon general appearance after judgment.[5]

A general appearance does not preclude setting up want of jurisdiction in the answer,[6] except when the jurisdictional objection is susceptible of being waived.[7] It has been held that a defendant, notified by publication, may appear, and move for a new trial, after the decree has been entered against his property, without thus giving the judgment a personal character.[8] The reason assigned was that "the judgment, being *in rem*, had binding force only against the attached property; that upon such judgment, the property of the defendant, other than that which was attached, could not be sold, nor does the judgment operate a lien thereon. * * * Banta *v.* Woods, 32 Iowa, 469. There were no defects in the judgment to be cured. It was a judgment *in rem*, and had no other force or effect.

[1] Boals *v.* Shules, 29 Iowa, 507; Jones *v.* Byrd, 74 Ill. 115; Klemm *v.* Dewes, 28 Id. 317.

[2] Boals *v.* Shules, 29 Iowa, 507–9.

[3] Harkness *v.* Hyde, 98 U. S. 476; Stanley *v.* Arnow, 13 Fla. 361; Black *v.* Clendenin, 3 Montana, 44.

[4] Dorr *v.* Gibboney, 3 Hughes, C. C. 382; Potomac Steamboat Co. *v.* Clyde, 51 Md, 174; Covert *v.* Clark, 23 Minn. 539. (See Curtis *v.* Jackson, Id. 268.)

[5] Anderson *v.* Coburn, 27 Wis. 558, 564.

[6] Wheelock *v.* Lee, 74 N. Y. 489; Landers *v.* Staten Island R. R. Co. 53 Id. 460; Brown *v.* Saratoga R. R. Co. 18 Id. 495; Du Puy *v.* Strong, 37 Id. 372.

[7] Varner *v.* Radcliff, 59 Ga. 448; Crowell *v* Galloway, 3 Neb. 215.

[8] Mayfield *v.* Bennett, 48 Iowa, 194.

The appearance of the defendant, by filing a petition to vacate it, does not, in the absence of any action upon his petition, give the judgment more force, or make it different from what it was before. If it was *in rem* only, it so remained after the petition to set it aside was dismissed."

An appeal may be taken—the defendant specially appearing therefor—without waiving objection to service;[1] though appearance for that purpose has been held to be a general one.[2]

One who specially enters his appearance on the record to object to the jurisdiction of the court, will be held to have made a general answer if it is in any respect responsive to the merits.[3]

Should he plead prescription, he will be deemed to have made a general appearance, however he may have made his entry.[4] Should he ask for default, he will be treated as a general appearer, though he may have entered himself as appearing specially to contest the sufficiency of service.[5] Should he move for a stay of proceedings to give him time for answering, he would be a general appearer; and he waives all defects in the service of process.[6] Should he file a demurrer and obtain leave to answer, he would make a general appearance.[7] Should he ask a continuance,[8] or consent to one,[9] without reservation, the effect is general.

[1] Martin *v.* Thierry, 29 La. Ann. 362.

[2] Wasson *v.* Cone, 86 Ill. 46; City of Alton *v.* Kirsch, 68 Ill. 261.

[3] Re Macauly, 27 Hun. 577: Handy *v.* Ins. Co. 37 Ohio St. 366-9.

[4] Miller *v.* Whitehead, 66 Ga. 283. But even a general appearance by attorney is not retroactive to avoid prescription previously acquired: Etheridge *v.* Woodley, 83 N. C. 11.

[5] Pry *v.* Hannibal & St. Jo. R. R. Co. 73 Mo. 123.

[6] Ins. Co. of North America *v.* Swineford, 28 Wis. 257; Keeler *v.* Keeler, 24 Id. 522; Upper Mississippi Transportation Co. *v.* Whitaker, 16 Id. 220; Tallman *v.* McCarty, 11 Id. 401; Stonach *v.* Glessner, 4 Id. 275; Adams Express Co. *v.* Hill, 43 Ind. 157. In Pa. the defendant's appearance *de bene esse* is conditional. If the summons be returned "served" it is general, but otherwise special. Blair *v.* Weaver, 11 Ser. & Rawle, 87. "Such an appearance is peculiar to Pennsylvania practice. It is not found in the English practice." Bolard *v.* Mason, 66 Pa. St. 138, 140.

[7] Miller *v.* State, 35 Ark. 276; Myers *v.* Smith, 29 Ohio St. 120.

[8] Lane *v.* Leech, 44 Mich. 163.

[9] Miller *v.* State, 35 Ark. 276.

Though the debtor may make his first appearance for the purpose of suing out a writ of error, yet if the case should be remanded, he may be considered in court, and a trial may be had contradictorily with him.[1] A special appearance to contest the jurisdiction of the court, does not confer jurisdiction upon the court, over the appearer as defendant in the suit.[2]

The sufficiency of notice cannot be questioned by the defendant after he has responded to it by making appearance.[3] Nor can he complain that he has received no notice of proceedings against a garnishee, if he has come into court personally or by attorney without making objection.[4] Notice to him, of the garnishment, is jurisdictional when required by statute.[5]

Besides the absence or illegality of summons or notification, patent defects in the affidavit, the bond, the writ, and the return are fruitful sources of objections that may be made upon special appearance. Such objections are often interposed after general entry, before answer to the merits, but they may be set up specially by the defendant without making himself a party to the suit for all purposes.

When the objections of a special appearer have been overruled, and he does not then answer to the merits, he is treated as not in court, and may, at the proper time, be defaulted for non-appearance,[6] (if he has been cited or notified,) just as though he had not been in court in any capacity.

Sec. 2. General Appearance.

Appearance is always deemed general, when it is unqualified. And when it is not entered as special or conditional, the defendant cannot afterwards be permitted to prove by parol evidence

[1] Reaugh *v.* McConnel, 36 Ill. 373.

[2] Branner *v.* Chapman, 11 Kan. 118; Heffner *v.* Gunz, 29 Minn. 108; Covert *v.* Clarke, 23 Minn. 539; Lee *v.* O'Shannessy, 20 Minn. 173; Potomac Steamboat Co. *v.* Clyde, 51 Md. 174; Harris *v.* Hardeman, 14 How. 343; Des Moines & Minn. R. R. Co. *v.* Alley, 103 U. S. 794. See Nazoo *v.* Cragin, 3 Dill. 474; Toland *v.* Sprague, 12 Pet. 300.

[3] Williams & Bruce *v.* Stewart, 3 Wis. 773.

[4] Everdell *v.* Sheboygan &c. R. R. Co. 41 Wis. 395.

[5] Williams *v.* Williams, 61 Iowa, 612.

[6] Loring *v.* Wittich, 16 Fla. 617.

that his appearance was thus limited.[1] But it may be qualified by the terms of an application to the court, though there be no express reservation confining appearance to the purpose of the application. For instance, if an unserved defendant applies to a State court for removal of a cause to a federal court, he is not to be deemed as assenting to the jurisdiction of the former, though he could hardly deny it in the latter in case of removal thither on his own application.[2]

The rule is, (applicable to attachment as well as other suits,) that a general appearance waives all irregularities that are not jurisdictional,[3] and it waives such jurisdictional objections as are susceptible of being waived: such as that of non-residence. If one would confine himself to an objection of that character, though jurisdictional, he must make a special appearance.[4] When the defendant comes to test the truth of the affidavit, he is in court for all purposes.[5]

A general, voluntary, unconditional appearance is equal to the personal service and return of summons.[6] It is so, even though the defendant should afterwards withdraw his appearance, or attempt to do so; for the effect of appearing would be the giving of jurisdiction over him as a personal party, so that judgment need not be confined in its operation to the property attached.[7] It waives defects and irregularities of the previous proceedings.[8] It waives all objections to the summons and ser-

[1] Collier *v.* Falk, 66 Ala. 223.

[2] Schwab *v.* Mabley, 47 Mich. 512, 515; a case in equity.

[3] Hart *v.* Smith, 17 Fla. 767; Cohen *v.* Trowbridge, 6 Kan. 385; Shuster *v.* Finan, 19 Kan. 114; Williams *v.* Stewart, 3 Wis. 773.

[4] Crowell *v.* Galloway, 3 Neb. 215; Varner *v.* Radcliff, 59 Ga. 448.

[5] Greenwell *v.* Greenwell, 26 Kan. 530.

[6] Christal *v.* Kelly, 88 N. Y. 285: Here, after two defendants had appeared and filed a plea and given an undertaking, the summons was amended by inserting the name of a third defendant. He voluntarily appeared; and when judgment was given against the three defendants, the sureties were held bound by the undertaking executed before the amendment of the summons. Catlin *v.* Ricketts, 91 N. Y. 668.

[7] Creighton *v.* Kerr, 1 Col. T. 509; Blackwood *v.* Jones, 27 Wis. 498.

[8] Carpenter *v.* Central Park &c. R. R. Co. 11 Abb. Pr. (N. S.) 416; Brown *v.* Balde, 3 Lans. (N. Y.) 283; Williams & Bruce *v.* Stuart, 3 Wis. 773; Greenwell *v.* Greenwell, 26 Kan. 530

vice,[1] whether the general appearance is personal or by attorney.[2]

The objection to an attachment bond which had but one surety though the statute required two, was held to have been waived by the defendant's general appearing, answering and bonding of the attached property.[3] Bonding, or acknowledgement of the service of the attachment suit authorizes a general judgment against the defendant.[4] Though the attachment should be subsequently dissolved, the acknowledgement of service by the defendant will enable the plaintiff to prosecute the personal suit to judgment.[5]

The defendant himself must have authorized the entry of his appearance, or it will be of no avail. Minutes of the clerk will not be held to include a person not cited under the term "defendants" when there are such in court, by the entry that they had come into court by their counsel and submitted their cause.[6] If general appearance has been entered by mistake or fraud, it may be set aside.[7] If a teller, cashier or other minor officer or any person appears for a corporation, it will not be bound unless he was previously authorized, or his action afterwards ratified.[8]

Sec. 3. Withdrawal of Attorneys—its Effect on Previous Appearance.

When a defendant has appeared by attorney, he cannot put

[1] Halett *v.* Nugent, 71 Mo. 13; Adams Express Co. *v.* Hill, 43 Ind. 157; Womack *v.* McAhren, 9 Ind. 6; Brayton *v.* Freese, 1 Ind. 121; Bury *v.* Conklin, 23 Kan. 460; Baldwin *v.* Murphy, 82 Ill. 485; (The People *v.* Barnet, 91 Ill. 422; The People *v.* Bradley, 60 Ill. 390: *mandamus* cases;) Bowen *v.* School District, 10 Neb. 265; Louisville &c. R. R. Co. *v.* Nicholson, 60 Ind. 158; Bradford *v.* Coit, 77 N. C. 72.

[2] Pomeroy *v.* Ricketts, 27 Hun. 242; Everdell *v.* Sheboygan R. R. Co. 41 Wis. 395; Rowland *v.* Coyne, 55 Cal. 1; (but see Douglass *v.* Habestro, 58 How. Pr. 276;) Hall *v.* Palmer, 18 Ind. 5; The Floyd County Ag. and Mechan. Association *v.* Tompkins, 23 Ind. 348; Wiley *v.* Pratt, Id. 628; Bush *v.* Bush, 46 Ind. 70; Collins *v.* Rose, 59 Ind. 33.

[3] Bryant *v.* Hendee, 40 Mich. 543.

[4] Buice *v.* Lowman &c. Co. 64 Ga. 769.

[5] Id.

[6] Fee *v.* The State, *ex rel* Pleasant, 74 Ind. 66.

[7] Allen *v.* Coates, 29 Minn. 46.

[8] Branch Bank *v.* Poe, 1 Ala. 396; Head *v.* Merrill, 34 Me. 586; Oliver *v.* C. & A. R. R. Co. 17 Ill. 587; Callahan *v.* Hallowell, 2 Bay, (S. C.) 8; Balt. & Ohio R. R. Co. *v.* Gallahue, 12 Gratt. 655.

himself out of court by his own volition; nor will the withdrawal of his attorney from the case have the effect of relieving the defendant from the responsibility as a party which the appearance has created. If the attachment-debtor has not been served; if he has not been notified by publication upon failure of summons; if the statute requires, upon such failure, that there must be not only advertisement in the newspapers but written notice mailed to the debtor beyond the State bounds, and these requirements have been neglected, still he is deemed to be in court if an attorney has appeared generally for him. And if, before plea filed, the attorney should withdraw, the defendant will be in court; the waiver of summons and notice and postal communication will be unaffected by the withdrawal, and he will be liable to default.

The effect of general appearance, whether by the debtor in proper person, or by his attorney, is to render the suit a personal one with the attachment proceeding ancillary thereto. The Supreme Court say, in general terms, that such appearance converts "into a personal suit that which was before a proceeding *in rem*."[1]

Express mention in the withdrawal that it is without prejudice to the plaintiff, after a rule to plead has been entered, leaves the plaintiff in possession of the rights acquired by the appearance: hence, should the rule be disregarded, he may take default against the defendant.[2] Without such expression, the defendant could be defaulted for not pleading. Must the case be

[1] Creighton *v.* Kerr, 20 Wall. 8, 12. In this case there had been no summons, nor publication and postal communication in default thereof, as required by the territorial statute of Colorado where the case arose. Attorneys appeared for the debtor but withdrew before pleading. Both the proceeding *in rem* and that *in personam* were evidently dependent upon the waiver of summons and notice. Neither could have resulted in valid judgment without the debtor's appearance when the statutory requirements had been disregarded.

[2] Id. The court were deciding a case in which the withdrawal of the attorneys was expressly "without prejudice;" and they say: "We decide the case upon the facts presented, and nothing would be gained by attempting to go beyond them." There can be no doubt, however, that the omission of the reservation would not affect the plaintiff's rights. The attorneys of the defendant could not prejudice the plaintiff by their withdrawal: Dubois *v.* Glaub, 52 Pa. St. 238.

delayed because the defendant has no attorney in court? Must the plaintiff suffer because of such neglect by the debtor who is now a party to the suit? Whether the withdrawal of the attorneys who have appeared for him in court be "without prejudice to the plaintiff" or otherwise, the result is the same.

Under such circumstances, the judgment may be for more than the sum claimed in the affidavit if more has been sued for in the declaration, (though privilege could be awarded only for the amount in the affidavit;) and the reason is that the withdrawal of the attorneys is not the withdrawal of their client who remains liable to have a personal judgment rendered against him.[1]

The withdrawal of a plea does not leave a case as though there had never been any pleading. Its filing may have been the defendant's first appearing in the case. Its unconditional withdrawal cannot destroy the effect of that appearance.[2] After general appearance by attorney, the defendant is in the position he would have been if personally summoned.[3] Special appearance may be withdrawn without such result.[4]

Sec. 4. The Forthcoming Bond.

The sheriff, instead of retaining the attached property in his actual possession, may intrust it to the defendant, taking from him a forthcoming bond, by which the latter binds himself, with one or more sureties, to pay a certain sum, on the condition that if he shall return the attached property to the sheriff for execution, in case judgment shall be rendered against him, the obligation shall be void, but otherwise to remain in full force and effect. On such a bond, after failure to deliver upon demand, if demand is required by the terms, or on failure to deliver for execution without demand, when none is requisite, the plaintiff, upon transfer to him by the sheriff, may recover

[1] Creighton *v.* Kerr, *supra*.

[2] Eldred *v.* Bank, 17 Wall. 551; Lawrence *v.* Yeatman, 2 Scam. 17; Rowley *v.* Berrian, 12 Ill. 198; Thompson *v.* Turner, 22 Ill. 389. *See* Dana *v.* Adams, 13 Ill. 691; Forbes *v.* Hyde, 31 Cal. 346; Cunningham *v.* Goelet, 4 Denio, 71; Lutes *v.* Perkins, 6 Mo. 57; Wynn *v.* Wyatt, 11 Leigh, 581; Lodge *v.* State Bank, 6 Blackf. 557; Michew *v.* McCoy, 3 Watts & S. 501.

[3] Habich *v.* Folger, 20 Wall. 1, 7; United States *v.* Yates, 6 How. 605; Murray *v.* Vanderbilt, 39 Barb. 140.

[4] Wright *v.* Boynton, 37 N. H. 9; *See* Graham *v.* Spencer, 14 Fed. Rep. 603; Jones *v.* Andrews, 10 Wall. 327; Wright *v.* Andrews, 130 Mass. 149.

of the principal, or of the surety, the value of the property, provided the value does not exceed the amount of the judgment, interest and costs.

The sheriff, by entrusting the property to the defendant under such bond, does not lose his legal possession of it. The defendant holds under the sheriff, so that the *res* is still in the constructive possession of the court. The ancillary proceeding in the suit does not abate by virtue of the forthcoming bond,[1] which would inevitably be the case were the court to lose its custody and jurisdiction of the property, and the defendant to regain unqualified possession of it.

However difficult it would be to follow the released property through several successive hands, (should it be repeatedly sold,) to vindicate the attachment lien upon it, it is well settled that the lien is not lost by the delivery of attached property to the defendant under a forthcoming bond.[2]

Here is the marked difference between the forthcoming bond and the bond to dissolve attachment: the first leaves the attachment intact, but the second dissolves it, and reduces the suit to a personal proceeding; the obligation of the forthcoming bond is to return the property for execution, while that of the dissolution bond is to pay whatever judgment may be rendered. The former is not, but the latter is, a substitute for the attachment.[3]

The forthcoming bond is taken by the sheriff, as his own official act, and the obligation of the principal and surety on the bond is usually to him.[4] The taking is not the act of the court or of the plaintiff, and therefore it does not put the property beyond the legal possession of the court so as to divest jurisdiction over it as a thing attached. On the other hand, the taking of the bond to dissolve, and the delivery of the

[1] Tyler *v.* Safford, 24 Kan. 580; Hilton *v.* Ross, 9 Neb. 406.

[2] Roberts *v.* Dunn, 71 Ill. 46; Scarborough *v.* Malone, 67 Ala. 570; Evans *v.* King, 7 Mo. 411; Jones *v.* Jones, 38 Mo. 429; Gray *v.* Perkins, 12 Smedes & M. 622; Gordon *v.* Johnston, 4 La. 304; Kirk *v.* Morris, 40 Ala. 225; Rives *v.* Wilborne, 6 Ala. 45; McRae *v.* McLean, 3 Porter, (Ala.) 138; Boyd *v.* Buckingham, 10 Humphreys, (Tenn.) 434.

[3] Eddy *v.* Moore, 23 Kan 113; People *v.* Cameron, 7 Ill. 468.

[4] Forrest *v.* O'Donnell, 42 Mich. 556.

property to the defendant pursuant thereto, destroys the plaintiff's lien, divests the court of the legal and even of the constructive possession of it; and, as before observed, reduces the whole proceeding to a personal suit against the defendant. The debtor is necessarily deemed to have made an appearance and to have become personally amenable, when he bonds. If he has not regularly appeared upon the record, and has not even been summoned, his coming to bond, even by attorney, gives jurisdiction over him.

A form prescribed by statute ought to be followed; but the obligors cannot avoid their obligation because some other verbiage, not inhibited, has been used in drawing the bond.[1] Clerical errors will not invalidate it, if they are not such as to mislead the obligors, or such as to render the terms ambiguous and unintelligible.[2] Though signed in blank, with consent that the sheriff may fill it up, the bond will hold good if written out by him over the names of the obligors, in the terms assented to, and pursuant to the requirements of the law, and acknowledged by the obligors.[3] An instrument may be good as a common law bond, though not written in the terms of the attachment statute.[4] It has been held, however, that a paper signed in blank with verbal authority to fill it up, is void when filled by the person so authorized, unless the signer afterwards acknowledges it.[5]

This bond is a special contract, authorized by statute, which the sheriff is bound to accept when the security is sufficient. The consideration of the contract is the release of the attached property;[6] its delivery to the defendant for him to hold under the sheriff.

[1] Smith *v.* Fargo, 57 Cal. 157; Sheppard *v.* Collins, 12 Iowa, 570; Purcell *v.* Steele, 12 Ill. 93; Curiac *v.* Packard, 29 Cal. 194.

[2] Hewes *v.* Cooper, 115 Mass. 42.

[3] Hill *v.* Scales, 7 Yerg. 410; Yocum *v.* Barnes, 8 B. Monroe, (Ky.) 496.

[4] Lightle *v.* Berning, 15 Nev. 389.

[5] Gilbert *v.* Anthony, 1 Yerg. 69; Wynne *v.* Governor, Id. 149; Byers *v.* McClanahan, 6 Gill & J. 250; Perminter *v.* McDaniel, 1 Hill, 267; Boyd *v.* Boyd, 2 N. & M. 125; United States *v.* Nelson, 2 Brock. 64; Ayres *v.* Harness, 1 Ham. 368; McKee *v.* Hicks, 2 Dev. 379. *Contra:* Wiley *v.* Moor, 17 S. & R. 438.

[6] Lightle *v.* Berning, 15 Nev. 389

Though the bond be executed nominally to the sheriff as the obligee, the attaching creditor is the real party interested; and the obligation is taken with the implication always accompanying such and similar undertakings, that it cannot be enforced against the defendant and his sureties if they are prevented in their performance of the stipulations by the fault of the plaintiff himself.[1] In case the defendant, after judgment against him, should fail to return the attached property to the sheriff after due notice, (when, by the terms, notice is necessary,) the plaintiff may sue upon the bond upon its being transferred to him by the sheriff. He is therefore the real obligee.

The defendant has the right of bonding the attached property upon offering proper security. The sheriff cannot deny him this right; and therefore, if the bond is good when taken, the sheriff will not be responsible if it should afterwards become bad. Even if the bonded property should be converted by the defendant, or by him and his surety, and thereafter both should become insolvent, the sheriff will not be responsible.[2]

After a bond has been received, the sheriff may still retain the attached property until the sureties have justified, or until the plaintiff has had an opportunity to test their solvency and sufficiency where that is a right of the plaintiff; at least, the property may be retained a reasonable time for this purpose.[3]

A second attacher cannot replevy. The sheriff would be liable for delivery to him so that the property should not be forthcoming to satisfy the lien of the first attacher.[4] If a second attacher has succeeded in bonding the property, he ought to be treated as a stranger; and a forthcoming bond, or replevy, by a stranger, is considered as in behalf of the defendant in Alabama.[5]

The term "part-owner" is not ordinarily employed as synonymous with "partner." Where the former is entitled to have

[1] Downman *v.* Chinn, 2 Wash. 189; Jaeger *v.* Stelting, 30 Ind. 341.

[2] Wheeler *v.* McDill, 51 Wis. 356.

[3] In New York, so held under a statute provision: Moses *v.* Waterbury Button Co. 15 Abb. (N. Y.) Pr. N. S. 205.

[4] Cordaman *v.* Malone, 63 Ala. 570; Scarborough *v.* Malone, 67 Ala. 570.

[5] Rhodes *v.* Smith, 66 Ala. 174; Ala. Code, § 3289.

attached property appraised, and delivered to him on bond, after it has been levied upon in a suit against another part-owner, it does not follow that a partner has this privilege.[1]

When the obligation of the bond is to pay a stated sum, conditioned on the return of the property, the principal or surety, on failure to make return, may be made to pay what was its value at the time of the execution of the bond—not what the property may be worth after the judgment or at the time when execution sale might be made. The value may be agreed upon, and may be expressed in the instrument. It may be ascertained by appraisement at the time of the release. It may be ascertained by the court or a jury.

Should the defendant bond a part of his attached property, obligating himself, with his surety, to return it in case of judgment against him, the value may be ascertained in like manner, and the obligation would be satisfied upon his payment for what he receives.[2]

The obligation is to produce the property or pay the sum stated therein to the amount of the judgment; not to pay the amount of the bond when it exceeds the judgment, nor the value of the property.[3] Where the obligors are liable for the value of the property, (as they must be when the judgment equals or exceeds it,) the amount is ascertained by the court and jury, and is not necessarily what was fixed by the appraisers when the bond was given.[4] But it must be what the property was then worth.[5]

If the obligation is for the purpose of obtaining actual charge of all the property that has been attached, he cannot return a part

[1] Breck *v.* Blair, 129 Mass. 127, in which it is said: "If we assume, as is stated in Pierce *v.* Jackson, 6 Mass. 242, that a creditor of one partner has the right to attach the partnership effects, yet we are of opinion that the statute was not intended to apply to such an attachment."

[2] Ellsworth *v.* Scott, 3 Abb. (N. Y.) N. Cas. 9, in exposition of Code Civ. Pro.; Brumby *v.* Bernard, 60 Ga 292.

[3] Schmidt *v.* Brown, 33 La. Ann. 416; Lemle *v.* Routon, Id. 1005.

[4] Fletcher *v.* Menken, 37 Ark. 206, in exposition of Gantt's Ark. Dig. § 406. See Allerton *v.* Eldridge, 56 Iowa, 709, in exposition of Iowa Code, § 2994.

[5] Perry *v.* Post, 45 Ct. 354.

and pay a part. It is no compliance with the terms of such bond, to tender the return of a part of the property that had been released under it.[1] There must be a tender or delivery of the whole; and the return of it must be promptly made, upon demand, or the defendant will lose his right of election.[2] However, if only a part has been bonded, the return of that portion would satisfy the obligation.[3]

The main object of the bond is to hold the surety. The defendant is no more bound, after signing, than before. The surety's obligation binds him to pay the sum nominated in the bond to the amount of whatever judgment may be rendered against his principal, in case the property should not be returned as stipulated.[4] When, in the instrument, time and place of return are stipulated, notice to the surety is unnecessary.[5] Unless the terms of the bond, or of the statute, warrant judgment upon mere motion, it cannot be allowed in practice.[6] The surety can set up no defense to the judgment rendered against his principal which the principal could not set up.[7] His liability is from the moment of failure to return on demand under *fi. fa.*[8] But he is liable only for what was realized by the sale of the property by the defendant on account of its perishability.[9]

When the bond is given to the plaintiff, and conditioned that the property shall be returned *or its value paid to him*, it is not a mere forthcoming bond; and it has been held to be a substitute for the attachment, operating the loss of the lien. Property thus released may be sold by the defendant, subjected to a new attachment in his hands by another creditor, levied

[1] Metrovitch *v.* Jovovich, 58 Cal. 341, in exposition of Cal. Code of Civil Proc. § 565.

[2] Goebel *v.* Stevenson, 35 Mich. 172.

[3] Brumby *v.* Barnard, 60 Ga. 292.

[4] Stuart *v.* Lacoume, 30 La. Ann., Part I, 157. Higdon *v.* Vaughan, 58 Miss. 572.

[5] Hunter *v.* Brown, 68 Ind. 225.

[6] Clary *v.* Haines, 61 Ga. 520, in exposition of Ga. Code, §§ 3319, 4083.

[7] McClosky *v.* Wingfield, 32 La. Ann. 38.

[8] Stuart *v.* Lacoume, 30 La. Ann. Part I, 157.

[9] Richards *v.* Craig, 8 Bax. 457.

upon in execution, etc., just as though released under the usual form of a bond to dissolve.[1]

In Georgia, a replevy bond is not a forthcoming bond. As prescribed by statute, it is for the payment of money and not the restitution of the attached property.[2] Much confusion would be avoided if lawyers and judges would always distinguish between forthcoming and dissolution bonds, and never employ the term "replevy bond" without such qualification of that more general designation as would show whether the obligation is for the return of the property or for the payment of money, either as the value of the bonded property or as satisfaction of such judgment as may be recovered. When, however, the defendant, under a forthcoming bond, receives funds deposited in court by a garnishee, the effect is about the same as receipt under a dissolution bond.[3]

Sec. 5. The Bond to Dissolve: its Effect.

When the attachment is dissolved by the giving of a bond conditioned upon the payment of whatever judgment may be rendered against the defendant, the lien upon the property thus released is removed. The suit continues then as a personal action only. The ancillary or attachment proceeding is at an end.[4]

[1] Jones *et al. v.* Peasley, 3 G. Greene, (Ia.) 53, in exposition of stat. authorizing such a bond. To the same effect: Austin & Co. *v.* Burgett, 10 Iowa, 302; Woodward *v.* Adams, 9 Iowa, 474.

[2] Clary *v.* Haines, 61 Ga. 520.

[3] Henry *v.* Gold Park Mining Co. 3 McCrary, 390, in exposition of Col. Code.

[4] Epstein *v.* Salorgue, 6 Mo. App. 352; Hills *v.* Mo re, 40 Mich. 210; Wolf *v.* Stix, 99 U. S. 1; Barry *v.* Foyles, 1 Pet. 311; Albany City Ins. Co. *v.* Whitney, 70 Pa. 248; Marsh *v.* Pier, 4 Rawle, 289; Duffy & Mehaffy *v.* Lytle, 5 Watts, 132; Fitch *v.* Ross, 4 Serg. & R. 557; Wilson *v.* Wilson's Admr. 9 Id. 429; Brenner, Trucks & Co. *v.* Moyer, 98 Pa. St. 274; Parker *v.* Farr, 2 Browne, 331; McCombs *v.* Allen, 82 N. Y. 114; Buckingham *v.* Swezy, 61 How. Pr. 266; Baxley *v.* Linah, 4 Harr. 241; Scanlon *v.* O'Brien, 21 Minn. 434; Dierolf *v.* Winterfield, 24 Wis. 143; Monroe *v.* Cutter, 9 Dana, 93; Hazelrigg *v.* Donaldson, 2 Met. (Ky.) 445; Harper *v.* Bell, 2 Bibb, 221; Inman *v.* Stratton, 4 Bush, 445; Myers *v.* Smith, 29 Ohio St. 120; Eddy *v.* Morse, 23 Kan. 113; Endress *v.* Ent, 18 Id. 236; People *v.* Cameron, 7 Ill. 468; Hill *v.* Harding, 93 Ill. 77;

It is the defendant's right to give such bond with sufficient security, and thus dissolve the attachment, at any stage of the cause. If the dissolution of an attachment is the object of the bond, it is necessary that there should have been some property attached, since otherwise the bond would be voidable. It is true that, without any attachment, the debtor might voluntarily execute a bond with security, obligating himself to the plaintiff to pay whatever judgment might be rendered, (as, indeed, such an instrument might be executed in any personal action:) but the defendant would not be bound further than he was before the execution of such a written obligation, and the instrument would not be a dissolution bond. It might hold good, however, against both the principal and surety as a common-law bond.

Attaching, when the debtor is summoned or voluntarily appears, has no further effect than to enable the plaintiff to get a privilege judicially recognized upon the thing attached, retroactive to the time of seizure, so as to enable him to make his money on his personal judgment. If the effect of the dissolution by bonding is to destroy the hypothetical lien created by attaching and replace it with security for the debt recoverable in case of judgment, the suit becomes wholly personal by reason of the dissolution, and is like an ordinary action to recover debt of a principal and his surety. When the attachment is sued out in an action separate from the main suit which it is meant to aid, and is dissolved by bonding, the defendant may afterwards plead in bar that judgment has been rendered in the principal case.[1] There would be two actions between the same

Fife *v.* Clarke, 3 McCord, (S. C.) 347; Erwin *v.* Heath, 50 Miss. 795; Philips *v.* Hines, 33 Miss. 163; Wharton *v.* Conger, 9 Sm. & M. 510; Ferguson *v.* Vance, 3 Lea, 90; Gillispie *v.* Clark, 1 Tenn. 2; Payne *v.* Snell, 3 Mo. 409; Morrison *v.* Alphin, 23 Ark. 136; Childress *v.* Fowler, 9 Id. 159; Reynolds *v.* Jordan, 19 Ga. 436; Irvin *v.* Howard, 37 Ga. 18; Shirley *v.* Byrnes, 34 Tex. 625; Kennedy *v.* Morrison, 31 Id. 207; Dorr *v.* Kershaw, 18 La. 57; Beal *v.* Alexander, 1 Rob. (La) 277; Benton *v.* Roberts, 2 La Ann. 243; McRae *v.* Austin, 9 La. Ann. 360; Love *v.* Voorhies, 13 La. Ann. 549; Kendall *v.* Brown, 7 La. Ann. 668; Rathbone *v.* Ship London, 6 La. Ann. 439.

[1] Brenner, Trucks & Co. *v.* Moyer, 98 Pa. St. 274.

parties on the same cause of action, and therefore the disposition of one is the disposition of both.[1] While the attachment suit remains intact, there is no inconsistency. One who has sued in assumpsit may bring an attachment suit on the same cause of action, because the latter is to create a lien to aid the former, and there is no inconsistency.[2]

The personal suit may be against a firm, and an ancillary one against a partner; and the latter, by which a lien is acquired, (against that member's interest, if the attached property belongs to the firm,) ought not be dismissed on the ground that no lien has been acquired against the property of the partnership.[3] When the personal suit is abated, its ancillary falls with it; but it has been held that such principal action against an insolvent debtor may be stayed, yet the attachment lien be enforced by judgment and execution, after the staying of the personal suit.[4] It is everywhere true that the personal suit does not end by the dissolution of the attachment.[5] It is only when the property action is the only one that dissolution closes the litigation.

Several defendants, each claiming separate property attached by the plaintiff in one suit, may be allowed to file separate bonds, each obliging himself for his rightful proportion of the plaintiff's demand as ascertained by the court.[6]

When the defendant has had his attached property restored to him, upon his giving bond with security to satisfy whatever judgment the plaintiff may recover against him, there is no longer any attachment lien resting on the property thus released.[7] If the court, on the trial of an attachment suit,

[1] Wilson *v.* Wilson's Admr. 9 S. & R. 429; Marsh *v.* Pier, 4 Rawle, 289; Duffy & Mehaffy *v.* Lytle, 5 Watts, 132; Baxley *v.* Linah, 4 Harr. 241.

[2] Swartz *v.* Lawrence, 12 Phila. 181; Roberts *v.* Dunn, 71 Ill. 46.

[3] Buckingham *v.* Swezy, 61 How. (N. Y.) Pr. 266.

[4] Berryman *v.* Stern, 14 Nev. 415, in exposition of 1 Nev. Comp. L. § 434.

[5] Hills *v.* Moore, 40 Mich. 210.

[6] Hughes *v.* Tennison, 3 Tenn. Ch. 641. *Contra:* Magee *v.* Callan, 4 Cr. C. C. 251.

[7] Hill *v.* Harding, 93 Ill. 77. Though this was substantially said in construction of a statute in which it is provided that after attachment has been set aside upon bond, "the cause shall proceed as if the defendant had been seasonably served with a writ of summons," (Rev. Stat. 1874. C. 11 § 14,) yet the court's reasons

after a release upon a forthcoming bond, renders a personal judgment against the defendant without recognizing and decreeing expressly or impliedly that he shall have a privilege on the property attached, it has been held to be virtually a release of the property, and a dismissal of the attachment,[1] (though in some States such recognition of lien and privilege is understood:) but, if there has been a dissolution bond executed, the judgment must necessarily be without recognition of lien and privilege and without reference to attached property.[2]

The *res* of the ancillary action disappears by the bonding, so that no intervenor could thereafter appear in the case to claim it.[3] Whether he has a *jus in re* or a *jus ad rem*, he can only secure his right by following the *res* itself. If the bond is a substitute for the *res* so far as the plaintiff is concerned, it is not so with respect to a third party claiming.

This subject may be elucidated by reference to libel suits for the enforcement of liens upon property, in which the *res* itself is impleaded and in which there is no personal defendant: such as a libel against a ship to enforce the pre-existing lien evidenced by a bottomry bond. Any person may appear, make stipulation, file a claim for the ship, and apply to bond her. If the court grant the application, the bond becomes the substituted *res* against which the suit is further prosecuted; and this is true in all cases *in rem* where there is no personal defendant.[4]

The claimant is always an actor—not the subject of the

seem to be of general application. It is said: "the character of the suit as a proceeding *in rem* was thereby, [by bonding,] completely changed. The suit thereupon became a proceeding *in personam* as completely as if it had been originally commenced by an ordinary summons, and no attachment had even been sued out; and the qualified lien which appellees [attaching creditors,] acquired by the levy of the attachment was forever gone."

[1] Wasson *v.* Cone, 86 Ill. 46; Lowry *v.* McGee, 75 Ind. 508.

[2] Love *v.* Voorhies, 13 La. Ann. 549.

[3] Gibson *v.* Wilson, 5 Ark. 422; McRae *v.* Austin, 9 La. Ann. 360; Monroe *v.* Cutter, 9 Dana, 93; Taylor *v.* Taylor, 3 Bush, 118; Dorr *v.* Kershaw, 18 La. 57; Mayberry *v.* Steagall, 51 Tex. 351.

[4] Houseman *v.* Cargo of the Schooner North Carolina, 15 Pet. 40; The Virgin, 8 Pet. 538; U. S. *v.* Ames, 99 U. S. 35; The C. F. Ackerman, 14 Blatchf. 360; The Blanche Page, 16 Id. 1.

action; he is rather a plaintiff than a defendant, in actions *in rem* of the character mentioned. The action cannot therefore become a personal one by the substitution of one *res* for another.

In attachment suits, on the contrary, there is always a person sued as well as a thing attached; and therefore, when the thing has been given up by the court because of the security given by the personal defendant that he will respond to the judgment, it becomes more simple and satisfactory to say that the suit goes on to the end as one *in personam*, than to say that there is yet a *res* in the substitute given. This should outweigh argument drawn from the analogy suggested by the practice in proceedings of the character above considered.

The garnishee, though he has answered that he owes the defendant or holds his property, should be discharged if the defendant appears and enters into bond, with security, conditioned that he will satisfy whatever judgment may be rendered against him in the suit. There would be no motive for the giving of such bond, unless the defendant thus becomes entitled to the dissolution of the attachment, the restitution of his seized property and the release of his own debtors from the effect of garnishment. The attaching creditor, being perfectly secured by the bond, (the worth of which he has had opportunity to test,) has no cause to complain of the results above mentioned. The bond, or undertaking, is to him a substitute for all of defendant's property or credits attached.

A garnishee, after the bonding, ought to be discharged before answering; but, whatever his answer, he should be discharged so soon as a motion is made therefor on suggestion of the bonding as the ground of the motion.[1]

Sec. 6. The Bond to Dissolve: Surety.

It is said to be a voluntary act, on the part of the defendant and his surety, when they execute a bond or undertaking to pay

[1] Myers *v.* Smith, 29 Ohio St. 120; Lecesne *v.* Cottin, 10 Martin, (La.) 174. The defendant may have funds paid into court by a garnishee released by bonding: Henry *v.* Gold Park Mining Co. 3 McCrary C. C. 390; Col. Code, § § 111, 112.

whatever judgment may be rendered against the defendant. Because of the voluntary character of the act, and of its obligations arising from the contract thus entered into between the defendant and his surety on the one part, and the attaching creditor on the other, the obligors would not be relieved by every circumstance subsequently occuring which might have rendered the attachment itself nugatory. By the provisions of the national bankrupt act, attachments sued out within four months prior to the filing of a petition in bankruptcy were dissolved by the surrender;[1] but if dissolution had taken place previously by bonding, the bankruptcy proceeding did not relieve the surety on the bond. From the time of the bonding, the attachment lien was at an end, so that the assignee in bankruptcy came in charge of the property freed from lien by the defendant's act and not by the provision of the bankrupt law.[2]

Though the surety's obligation is contingent, and subordinate to that of his principal; and though he is bound to pay only in case the plaintiff recover judgment and the defendant fail to satisfy it, so that he does not, by signing the bond, become immediately and separately liable,[3] yet his obligation is to pay the debt when adjudged, if his principal should not do so and cannot be made to do so. Hence, in case of the bankruptcy of the latter after the ancillary proceeding has been ended by the bond dissolving it, (and after the suit has become altogether a personal one,) the surety is in no better position than he would be if bound by an appeal bond to pay such judgment as might be rendered in an appellate court; no better than if he were surety on a promissory note and his principal should go into bankruptcy. The discharge of the principal would not dis-

[1] West Phila. Bank *v.* Dickson, 95 U. S. 180; Morgan *v.* Campbell, 22 Wall. 381; Miller *v.* Bowles, 58 N. Y. 253; Risley *v.* Brown, 67 N. Y. 160; Goodhue *v.* King, 55 Cal. 377.

[2] Wolf *v.* Stix, 99 U. S. 1; McCombs *v.* Allen, 82 N. Y. 114; Holyoke *v.* Adams, 59 N. Y. 233; Bildersee *v.* Aden, 12 Abb. Pr. (N. S.) 324; Cornell *v.* Dakin, 38 N. Y. 253; Braley *v.* Boomer, 116 Mass. 527; Cutler *v.* Evans, 115 Mass. 27; Hamilton *v.* Bryant, 114 Mass. 543; Carpenter *v.* Turrell, 100 Mass. 450; Bates *v.* Tappan, 99 Mass. 376; Zollar *v.* Janvrin, 49 N. H. 114; Colman *v.* Bean, 3 Keyes, 94; Parks *v.* Sheldon, 36 Ct. 466.

[3] Wehle *v.* Spellman, 75 N. Y. 585

charge the surety. The case is altogether different from that of the dissolution of an attachment for illegality in its issue, its levy, its return, etc., or anything rendering the proceeding void and the bond inoperative against the principal and therefore not binding upon the surety from the beginning.

When the incipient lien is nipped in the bud by the dissolution bond, so that it can never thereafter come to maturity, it cannot be resuscitated by the court upon the bond becoming bad thereafter by reason of the surety's failure or any other cause. A new attachment, in such case, might be issued for the purpose of creating a new lien, where there is statutory authority therefor; and, without a new attachment, the court, upon a rule by the plaintiff upon the defendant to show cause why other security should not be given, may, (upon statute authority,) make such rule absolute. But the court cannot undo what has been done by a previously valid bond; cannot neutralize the effect of the dissolution in restoring the attached property to the defendant free from lien.[1]

When the worthlessness of the bond, by reason of the surety becoming bankrupt after its execution, has been judicially ascertained, the plaintiff has no equivalent for his lost lien; and there is as much reason for allowing him to create another as there was for allowing him to create the first. He ought therefore to be permitted, in such case, to make a new affidavit and attachment bond, and have a new writ and a new levy, so as to create another incipient lien to be perfected by judgment, taking its date from the time of the new levy, even without express statute authorization beyond the general provisions.

The bond to dissolve is given by the defendant and his surety on the assumption that the attachment is valid; and the plaintiff, as obligee, receives it as a substitute for the valid attachment, knowing that the contract may be avoided by the obligors should it prove wanting in consideration. There would be no reciprocity if the plaintiff should get his claim secured, and

[1] Ferguson *v.* Vance, 3 Lea, (Tenn.) 90; Stewart *v.* Dobbs, 39 Ga. 82; Hartford Quarry Co. *v.* Pendleton, 4 Abb. (N. Y.) Pr. 460; Dudley *v.* Goodrich, 16 How. (N. Y.) Pr. 189.

give up only an illegal attachment—that is, give up nothing in return.

When he comes to sue upon the bond, the defendant and his surety may set up the illegality of the attachment in defense, except with regard to matter conceded by the bonding; they may, under proper allegations, inquire into the affidavit, bond, writ, return, jurisdiction, etc.; and, if the statute under which the suit was brought has not been substantially followed, they may succeed in avoiding the obligations of the bond.[1]

The surety upon a bond given by the defendant to dissolve an attachment takes his obligation with reference to the cause as it then stands; and should the plaintiff afterwards so change his pleadings as to make virtually a new action, how can it be said that the surety would have obligated himself under such new order of things? He may have been satisfied that the plaintiff could not recover in the action, and may therefore have been willing to give the defendant present relief by signing as his bondsman, though he would not have signed had the suit been well grounded.

But, notwithstanding the bonding, the plaintiff may amend without relieving the defendant's surety from any obligation, if he does not change the character of the action by introducing new counts or new grounds. It is not just to the surety

[1] Vose *v.* Cockroft, 44 N. Y. 415; Homan *v.* Brinckerhoff, 1 Denio, 184; Kanouse *v.* Dormedy, 3 Denio, 567; Matter of Faulkner, 4 Hill, 598; Caldwell *v.* Colgate, 7 Barb. 253; Bildersee *v.* Aden, 62 Id. 175; Hodge *v.* Norton, 22 Kan. 374; *Contra:* Cruyt *v.* Phillips, 16 How. (N. Y.) Pr. 120, (if the court's jurisdiction is independent of the attachment.) Scanlon *v.* O'Brien, 21 Minn. 434, in exposition of Minn. Gen. Stat. Ch. 65, § 95. Dunn *v.* Crocker, 22 Ind. 324; (see Gass *v.* Williams, 46 Ind. 253;) Coleman *v.* Bean, 32 How. Pr. 370; McMillan *v.* Dana, 18 Cal. 339; Bacon *v.* Daniels, 116 Mass. 474. In Homan *v.* Brinckerhoff, the defendant, after personal judgment against him, was sued on the dissolution bond, and he defended by pleading the invalidity of the attachment by reason of the absence of an attachment bond. The court held that by the appearance of the defendant in the attachment suit, the court had had jurisdiction of that suit, evidently meaning jurisdiction over the person of the defendant, for it is added: "That will not aid the plaintiff; he did not hold the property under the judgment. * * * He had no other hold on the property than such as the attachment gave him, and that was utterly void for want of jurisdiction to issue it."

that he should be put in a worse condition than he was in when he signed, by any amendment that would strengthen the old grounds or make the plaintiff's position any better, and the surety's consequently worse. But amendment is allowed in practice; and even if new counts and new grounds are introduced, the surety will be liable after final judgment, if the judgment is not based on the new grounds or amended counts.[1]

Sureties are not discharged by an amendment of the summons so as to reach a third defendant;[2] nor by an amendment of pleading not affecting their obligation;[3] nor by an amendment of one count of a declaration, if the attachment holds good on another;[4] but an amendment increasing the demand would discharge them.[5] The bond would not be affected by the dismissal of one of the defendants to the suit.[6]

When it is among the conditions of the bond that in case the plaintiff should recover, judgment shall be entered against the surety without notice, it may be so entered though the surety be a non-resident.[7]

It has been held that a mistake in the bond, by which the writ was described as having been issued from the Circuit Court instead of the District Court, cannot avail the surety so as to release him from his obligation.[8]

If, after property has been returned to the defendant by reason of the giving of a dissolution bond, the result of the continuing personal suit should be a judgment for the defendant, there can be no shadow of obligation remaining against either the principal or the surety on such bond. And yet an effort was made to hold the sureties in a case against two defendants—husband and wife. The property belonging to the latter, she bonded it: and thus ended the proceeding as an attachment suit. The case went on as a personal one, and the judgment was against the husband but in favor of the wife. Upon a rule

[1] Cutter *v.* Richardson, 125 Mass. 72; Wood *v.* Denny, 7 Gray, 540; Mann *v.* Brewer, 7 Allen, 202.

[2] Christal *v.* Kelly, 88 N. Y. 285.

[3] U. S. *v.* Mosely, 7 Saw. C. C. 265.

[4] Warren *v.* Lord, 131 Mass. 560.

[5] Prince *v.* Clark, 127 Mass. 599; Hill *v.* Hunnewell, 1 Pick. 192; Willis *v.* Crocker, Id. 204.

[6] Poole *v.* Dyer, 123 Mass. 363.

[7] Kuhn *v.* McMillan, 3 Dill. 372.

[8] Ripley *v.* Gear, 58 Iowa, 460.

to hold her sureties liable for the judgment against her husband, the court said that whether it was irregular practice, or not, to file a claim in an action *in personam*, the sureties could not be held beyond the terms of the bond.[1] This, of course; but why say the claim was in a personal action? It was in the attachment proceeding against the attached property that she claimed and bonded, thus reducing the case to a personal proceeding only. The right to claim and bond was as regular as though the proceeding had been in vindication of a pre-existing lien, such as that created by a bottomry bond.[2] "A stipulation for value can be substituted for property in custody, at any time, by order of court. At any time before default, property in custody may be bonded in pursuance of Sec. 941, Rev. Stat. of U. S., without any other consideration than is prescribed by that section."[3] And, in attachments, the federal courts follow the State laws with respect to bonding, when the U. S. statutes are inapplicable, as in the practice generally. The rule is that the federal courts, sitting in any State, give effect to its attachment laws as construed by the Supreme Court of that State, though it is held that they are not bound to follow such construction.[4]

The further discussion of the bond to dissolve is relegated to the chapter on the dissolution of attachment.

[1] Jaycox *v.* Chapman, 10 Ben. 517.
[2] The Archer, 10 Ben. 99.
[3] The Martha C. Burnite, 10 Ben. 196.
[4] Lehman *v.* Berdin, 5 Dillon, 340, and cases cited pp. 325–6.

CHAPTER XIII.

DISSOLUTION OF ATTACHMENT.

§ 1. The Motion to Quash.
2. Quashing for Errors Patent.
3. Quashing on Evidence beyond the Record.
§ 4. Traverse after Dissolution by Bonding.
5. Dissolution by Final Judgment for Defendant.

Sec. 1. The Motion to Quash.

Since a court which has authorizedly granted an attachment has the inherent power of controlling its own process, it is competent to entertain a motion to quash it.[1] The application need not necessarily be made to the judge who granted the writ.[2] It may be made to a judge at chambers, in some States[3] though it is usual to move in open court.

Vacating an attachment is a judicial act, and one of such character that it cannot be entrusted to the ministerial officer who issued the writ.[4]

The merits of the principal cause are not involved in a rule to dissolve the attachment.[5] The rule, when founded on the

[1] Phillips *v.* Welch, 11 Nev. 187; Furman *v.* Walter, 13 How. Pr. 348; Bank of Commerce *v.* Rutland &c. R. R. Co. 19 Id. 1; Morgan *v.* Avery, 7 Barb. 656; Gay *v.* Eaton, 27 La. Ann. 166.

[2] Ruppert *v.* Haug, 87 N. Y. 141; S. C. 62 How. Pr, 314. See Conklin *v.* Dutcher, 5, How. Pr. 386; White *v.* Featherstonhaugh, 7 Id. 357; Bank of Lansingburgh *v.* McKie, Id. 360.

[3] Cureton *v.* Dargan, 12 S. C. 122; Wells *v.* Danford, 28 Kan. 487; Shedd *v.* McConnell, 18 Kan. 594. But it was held that the rule could not be heard and determined in chambers. Cohn *v.* Justice, 1 Kan. 220.

[4] Matter of Marty, 3 Barb. 229; but there is an exception mentioned in this case, under the N. Y. practice existing when it was rendered. In Michigan, application is made to Circuit Court commissioners. Patterson *v.* Goodrich, 31 Mich. 225; Vinton *v.* Mead, 17 Id. 388; Albertson *v.* Edsall, 16 Id. 205; Nelson *v.* Hyde, 10 Id. 521; Edgarton *v.* Hinchman, 7 Id. 352.

[5] Hermann *v.* Amedee, 30 La. Ann. 393; Olmstead *v.* Rivers, 9 Neb. 234.

papers upon which the writ was issued, cannot be defeated by the plaintiff's introduction of new evidence to sustain his grounds.[1] He must stand or fall upon the platform which he has previously raised. The merits can only be investigated under such a rule when the statute directly or impliedly requires it. If the judge, to dissolve an attachment, must be satisfied that there was no good cause for issuing it, he would necessarily have to investigate the merits.[2] An attachment may be dissolved as to a part of the property attached, in which case the order should designate what part is released.[3]

The motion is made by the defendant whose property has been attached. If there are no other parties in the case but the plaintiff and the defendant, and no other person directly interested, the right of applying for the vacation of the attachment is confined to the defendant.[4] He has this right by reason of his ownership and the interest which he has in having the property released. He should have either ownership or the right of possession.[5] The right of possession, without ownership, would entitle him to make the motion; and he should allege this right in his application.[6] He should verify his allegations, when the practice of his state requires it;[7] but if he has filed a sworn answer that may be used as his affidavit on motion to dissolve where the motion may be legally made thereafter.[8]

The defendant cannot be heard for the purpose of having the attachment dissolved if he has assigned the property;[9] nor if the property is under execution of a judgment against him;[10]

[1] Steuben Co. Bank *v.* Alberger, 56 How. (N. Y.) Pr. 345.

[2] Folsom *v.* Teichner, 27 Mich. 107, in exposition of Compiled Laws, §§ 6128–31, (1871) relative to attachments dissolved by commissioners, *etc.*

[3] Ellsworth *v.* Scott, 3 Abb. New Cases, 9.

[4] Cockrell *v.* McGraw, 33 Ala. 526; Schoppenhast *v.* Bollman, 21 Ind. 280; Williams *v.* Walker, 11 Iowa, 77; Isham *v.* Ketchum, 46 Barb. 43; Ketchum *v.* Ketchum, 1 Abb. Pr. N. S. 157; Kincaid *v.* Neal, 3 McCord, (S. C.) 201; McBride *v.* Floyd, 2 Bailey, (S. C.) 209.

[5] Zook *v.* Blough, 42 Mich. 487.

[6] Johnson *v.* DeWitt, 36 Mich. 95; Patterson *v.* Goodrich, 31 Id. 225.

[7] Osborne *v.* Robbins, 10 Mich. 277.

[8] Nelson *v.* Murch, 23 Minn. 229.

[9] Chandler *v.* Nash, 5 Mich. 409.

[10] Johnson *v.* DeWitt, 36 Mich. 95.

nor if he has no rightful claim to the possession;[1] nor if he has no title;[2] but a partner in property may be entitled to the restoration.[3]

The surety on a forthcoming bond is so far a party to the proceeding that there may ultimately be a judgment against him in the case and he is certainly interested in the property attached so far as to be responsible for its restoration upon judgment being rendered against his principal. He has therefore been held competent to move for the vacation of the attachment.[4] The surety on a dissolution bond has succeeded in arresting a judgment, on the ground that the attachment was void for fatal, patent defects, after a previous motion to arrest, made by his principal, had been overruled.[5]

If there are other parties in the case, interested in having the attachment dissolved, any one of them may move to quash; but it is essential to the right of any one to move that he be interested in setting the attachment aside.[6] Where, in the practice of some of the States, claimants other than the defendant, and intervenors, are allowed to appear, their right to apply for the vacation of the attachment depends upon the interest which they establish in themselves, with right of possession; and if, upon a change in the plaintiff's pleadings, such right and interest become no longer involved, they cannot be heard to make the motion.[7]

The assignee of attached property is interested in having it released, and he may therefore appear and make application for that purpose.[8] Even if he has received an assignment of only a part of the property, he may move to quash with reference to such part.[9] An assignment by a non-resident debtor will not

[1] Price *v.* Reed, 20 Mich. 72.

[2] Mitchell *v.* Skinner, 17 Kan. 563.

[3] Edwards *v.* Hughes, 20 Mich. 289.

[4] Burch *v.* Watts, 37 Tex. 135.

[5] Neal *v.* Gordon, 60 Ga. 112.

[6] Long *v.* Murphy, 27 Kan. 375; Mitchell *v.* Skinner, 17 Id. 563; Capehart *v.* Dowery, 10 W. Va. 130; Sims *v.* Jacobson, 51 Ala. 186; Tim *v.* Smith, 93 N. Y. 87.

[7] Mendes *v.* Freiters, 16 Nev. 388.

[8] Baum *v.* Raphael, 57 Cal. 361; Shoe & Leather Bank *v.* Mechanics Bank, 89 N. Y. 440.

[9] Trow's Printing and Book-binding Co. *v.* Hart, 85 N. Y. 500; S. C. 9 Daily, 413; Moses *v.* Arnold, 43 Iowa, 187.

dissolve a previous attachment.[1] The lien is not lost by insolvency proceedings in Illinois.[2]

A mortgagee or other lien holder, being protected otherwise, has not such interest in the attachment proceeding instituted by another creditor as to render him competent to appear and move to quash the attachment.[3]

Garnishees, who are not, in the full sense, parties to the suit between the plaintiff and defendant, and even interested strangers who have made themselves intervening parties to protect their rights, have been allowed to make the motion to dissolve, under the practice in some of the States;[4] and subsequently attaching creditors have been allowed to intervene, set up their rights, and move to quash the first attachment.[5]

In order to entitle an intervenor to make such motion, his interest must be direct;—at least, not too remote. A judgment creditor in another suit cannot be heard to move the vacation of attachment on the ground that it is an obstruction to his execution; though he may, it seems, on the ground that the attachment is a cloud upon his title.[6]

The judge, though necessarily disinterested in the issue of the suit, may quash an attachment without motion, when there are causes affecting his jurisdiction, as when there is no affidavit at all, or one radically, incurably and fatally defective on its face, or like reason; or, he may do so on motion by an *amicus curia*.[7]

The plaintiff, as a matter of course, may release the attachment at any time; and his attorney may do so by virtue of his general authority as attorney.[8]

[1] Pierce *v.* Crompton, 13 R. I. 312.

[2] Life Ass'n. of America *v.* Fassett, 102 Ill. 315.

[3] May *v.* Courtnay, 47 Ala. 185; Cockrell *v.* McGraw, 33 Id. 526.

[4] Chase *v.* Foster, 9 Iowa, 429; Baird *v.* Williams, 19 Pick. 381; Pierce *v.* Richardson, 9 Met. (Mass.) 69; Henderson *v.* Thornton, 37 Miss. 448; Pendleton *v.* Smith, 1 W. Va. 16; Clarke *v.* Meixsell, 29 Md. 221.

[5] Baird *v.* Williams, 19 Pick. 381; Smith *v.* Davis, 29 Hun. 301; Tim *v.* Smith, 93 N. Y. Ruppert *v.* Haug, 87 Id. 141.

[6] Steuben Co. Bank *v.* Alberger, 83 N. Y. 274; S. C. 61 How. Pr. 227.

[7] Ex parte R. R. Co. 103 U. S. 794; Planters' and Merchants' Bank *v.* Andrews, 8 Porter, (Ala.) 404.

[8] Benson *v.* Carr, 73 Me. 76.

There can be no motion to quash till appearance in the cause, either general or special—a matter of course. There can be none for patent errors after issue joined upon the merits, under the practice in several States.[1] This practice, however, is not universal.[2] And the defendant does not waive his traverse of the plaintiff's affidavit by pleading to the merits of the main action; the two defenses are not inconsistent: the former going to the writ and the latter to the declaration.[3]

The motion ought to be made at the first term of court after the defendant's appearance,[4] though this rule is not invariable.[5]

The application should be certain with regard to the property sought to be released. Such certainty would not require a full description of the property attached, when the motion is made in the attachment suit, and when reference to it would necessarily be understood; but if there is a separate proceeding for dissolution, (as authorized under some circumstances,) there should be an unmistakable description of the property.[6] The applicant should allege his ownership or right of possession.[7] The motion should bear the title of the suit in which it is made; but that has been held unnecessary when there is an application

[1] Myers *v.* Perry, 1 La. Ann. 372; Brinegar *v.* Griffin, 2 Id. 154; Ealer *v.* McAllister, 14 Id. 821; Reynolds *v.* Simpkins, 67 Ala. 378; Steamboat Farmer *v.* McCraw, 31 Ala. 659; Porter *v.* Pico, 55 Cal. 165; Grey *v.* Young, Harp. (S. C.) 38; Spaulding *v.* Simms, 4 Met. (Ky.) 285; Callender *v.* Duncan, 2 Bailey, (S. C.) 454; Paddock *v.* Matthews, 3 Mich. 18; Dunn *v.* Crocker, 22 Ind. 324.

[2] Parsons *v.* Sprague, 65 How. Pr. 151; Binns *v.* Williams, 4 McLean, 580; Thompson *v.* Culver, 38 Barb. 442; Zeregal *v.* Benoist, 33 How. Pr. 129; Bowen *v.* Bank of Medina, 34 Id. 408. (See Spencer *v.* Rogers Locomotive Works, 13 Abb. Pr. 180; Whiteside *v.* Oakman, 1 Dall. 294; Jarvis *v.* Barrett, 14 Wis. 591.)

[3] Parker *v* Brady, 56 Ga. 372.

[4] Irvin *v.* Howard, 37 Ga. 18; Neal *v.* Bookout, 30 Id. 40; Hall *v.* Brazelton, 40 Ala. 406; Lawrence *v.* Jones, 15 Abb. Pr. 110; Sweezey *v.* Bartleti, 3 Abb. Pr. N. S. 444; Miltenberger *v.* Lloyd, 2 Dall. 79.

[5] Tarbell *v.* Bradley, 27 Vt. 535; Wilson *v.* Louis Cook Manuf. Co. 88 N. C. 5; Penman *v.* Gardner, 4 Yeates, 6; Kearney *v.* McCullough, 5 Binn. 389. In Tennessee, held that it must be made within twelve months: Bledsoe *v.* Wright, 58 Tenn. 471.

[6] As in Michigan, before a Circuit Court Commissioner: Patterson *v.* Goodrich, 31 Mich. 225; Nelson *v.* Hyde, 10 Id. 521.

[7] Johnson *v.* De Witt, 36 Mich. 95; Patterson *v.* Goodrich, 31 Id. 225.

for dissolution in a separate proceeding.[1] In the latter case, the application should be verified by oath.[2]

The most important requisite, (without which the motion or application would be futile,) is the assignment of the reasons for quashing.[3] The irregularities apparent on the face of the proceedings should be specified. They are usually defects in the petition, the service, the affidavit, the bond, the writ, the levy, the return, or the publication.

It is not always necessary that special notice should be given to the plaintiff of a motion to dissolve. He is constructively in court, if not actually present, and is, under the practice extensively prevailing, presumed to know what is done in the cause he has instituted. But when the defendant has taken a rule on the plaintiff to show cause why attachment should not be quashed on the grounds assigned, the rule must be served. For some purposes, such as the release of exempt property, notice is indispensable.[4]

Sec. 2. Quashing for Errors Patent.

When the attachment proceeding is radically defective upon its face and when the writ has been unwarrantably issued, the proper remedy, and the one employed in most of the States, is the motion to quash for the errors thus apparent.[5] There are, however, in some States, other means than this method of pro-

[1] Heyn *v.* Farrar, 36 Mich. 258.

[2] Osborne *v.* Robbins, 10 Mich. 277.

[3] Osborne *v.* Robbins, 10 Mich. 277; Freeborn *v.* Glazer, 10 Cal. 337.

[4] Claflin *v.* Lisso, 31 La. Ann. 171.

[5] Anderson *v.* Johnson, 32 Gratt. 558; Harrison *v.* King, 9 Ohio St. 388; Cooper *v.* Reeves, 13 Ind. 53; Pittman *v.* Searcey, 8 Iowa, 352; Holloway *v.* Herryford, 9 Id. 37; Bower *v.* Town, 12 Mich. 230; Coward *v.* Dillinger, 56 Md. 59; Harper *v.* Scuddy, 1 McMull, (S. C.) 264; Read *v.* Ware, 2 La. Ann. 498; Slark *v.* Broom, 7 Id. 337; Kendall *v.* Brown, Id. 668; Bonner *v.* Brown, 10 Id. 334; Hill *v.* Cunningham, 25 Tex. 25; Wright *v.* Smith, 19 Tex. 297; Messner *v.* Lewis, 20 Tex. 221; Espey *v.* Heidenheimer, 58 Tex. 662; Lambden *v.* Bowie, 2 Md. 334; Gasherie *v.* Apple, 14 Abb. Pr. 64; Brewer *v.* Tucker, 13 Id. 76; Dickinson *v.* Benham, 12 Id. 158; Morgan *v.* Avery, 7 Barb. 656; (but see Boscher *v.* Roullier, 4 Abb. Pr. 396;) Hill *v.* Bond, 22 How. Pr. 272; Baldwin *v.* Cooper, 17 Miss. 516; Rice *v.* Thornton, 69 Ala. 473.

cedure, when the attachment has been illegally issued or is defective.[1]

When the personal suit is radically defective, or not such as to form the basis of an attachment according to statute provisions, the ancillary proceeding must fall with it.[2] Of course, should an exception or demurrer to such principal action be successfully pleaded, the subsidiary proceeding would be at an end, without any occasion for a motion to quash it. Still, in case the defendant has made only a special appearance, and prefers the motion to quash upon assigning patent errors, rather than pleading in the principal action, he may, under such motion, set up that the attachment was not sued out under such suit as the statute requires as a foundation for attachment. If, for instance, the suit is on a bill of exchange, and it appears by the petition itself that the plaintiff's title to the bill was not complete when the suit was instituted, attachment thereunder may be quashed upon such motion.[3] If the cause of action is founded on a sealed instrument yet the declaration is in trespass on the case, attachment sued out under such suit, being without statute authorization, may be quashed in like manner.[4] So also, if attachment has been sued out in any suit in which this remedy is not authorized by statute.[5] Courts may inquire into the allegations of the principal action when hearing a motion to dissolve attachment;[6] but the debt cannot be summarily disproved for the purpose of having the attachment dissolved.[7]

The summons should be such as to give the debtor the information necessary to put him upon inquiry; should communicate to him knowledge of the institution of the suit, of the court in which it is instituted, and the essentials tending to put him upon his defence. When a copy of the petition accompanies the

[1] Meuse *v.* Osbern, 5 Mo. 554; Jordan *v.* Hazard, 10 Ala. 221; Gill *v.* Downs, 26 Id. 670; Evans *v.* Andrews, 7 Jones, (N. C.) L. 117; Cheny *v.* Nelson, Id. 141; Reiss *v.* Brady, 2 Cal. 132.

[2] Quinland *v.* Danford, 28 Kan. 507.

[3] Blanchard *v.* Grousset, 1 La. Ann. 96.

[4] TenBrock *v.* Pendleton, 5 Cranch. C. C. 464.

[5] Stone *v.* Boone, 24 Kan. 337; Riddle *v.* Black, 99 Pa. St. 380; Elliott *v.* Jackson, 3 Wis. 649; Griswold *v.* Sharpe, 2 Cal. 17.

[6] Bundrem *v.* Denn, 25 Kan. 430.

[7] Fisher *v.* Hood, 2 Martin, (La.) 113.

summons, he is, by means of that, enabled to understand the creditor's demand. Forms of summons differ, but the essentials are nearly the same everywhere. If the summons is misleading,—especially if it has misled the defendant, its defects may constitute good ground for quashing an attachment.

If the summons and writ are regular in form, they must be served by the proper officer, since service by another has been held ground for vacating attachment.[1] The defendant must be served at the proper time: an attachment may be dissolved because it has been served on the defendant when service could not legally be made.[2]

Total absence of affidavit, or of one setting forth the required statute facts, is an irrefragable reason for quashing an attachment.[3] The defect, in such case, is jurisdictional, and the judge should discontinue proceedings upon his own motion, so far as the ancillary suit is concerned, if the defendant does not move to dismiss. If the requisitions of the statute are not substantially observed, with regard to the affidavit, the proceedings under it are void, and the attachment may be quashed on motion.[4] Failure to include in the affidavit the averment "that the attachment is not sued out for the purpose of vexing or harassing the defendant," is ground for dissolution, where such averment is a statutory requisite.[5] So, when the statute required that oath by an attorney against his client's non-resident debtor should be positive in the allegation of non-residence, his affidavit that he was "informed and believed" was insufficient,[6] though statutes are not all so exacting with respect to all deponents.[7]

Attachments have frequently been quashed because of alternation in the statement of the grounds for the writ;[8] but much

[1] Lawrence *v.* Featherston, 18 Miss. 345.

[2] McFerran *v.* Wherry, 5 Cranch C. C. 677.

[3] Erwin *v.* Commercial Bank, 3 La. Ann. 186.

[4] Clark *v.* Roberts, 1 Ill. 222; Coward *v.* Dillinger, 56 Md. 59.

[5] Saunders *v.* Cavett, 38 Ala. 51; Moody *v.* Levy, 58 Tex. 532.

[6] Deupree *v.* Eisenach, 9 Ga. 598.

[7] McNamara *v.* Ellis, 14 Ind. 516.

[8] Stacy *v.* Stichton, 9 Iowa, 399; Jewel *v.* Howe, 3 Watts, (Pa.) 144; Wray *v.* Gilmore, 1 Miles, (Pa.) 75; Allen *v.* Fleming, 14 Rich. (S. C.) 196.

depends upon the nature of the alternation, and many affidavits are perfectly good notwithstanding the disjunction of the grounds, as it was shown in the third chapter.[1] Uncertainty, however, is good ground for the motion to dissolve; even though the allegations be clearly stated in the affidavit, if the averments of the petition render the plaintiff's statements ambiguous as a whole, the attachment may be quashed.[2] A verified petition may eke out an affidavit and render the plaintiff's meaning certain.[3]

The truth of the affidavit is not brought into question by a rule to quash for patent errors.[4]

A slight error or a little delay, by the clerk, in filing an affidavit duly made, is not good ground for vacating an attachment, though it may have been levied before the filing.[5]

In the sections on the attachment bond, in the third chapter, the necessity of complying with the requirements of statutes, with respect to it, was sufficiently set forth. The failure of the plaintiff to comply is proper ground for dissolving an attachment.[6] Though the plaintiff may have signed a blank bond, failure to have it filled and filed leaves him in the same plight as though he had done nothing towards compliance with the requirement.[7] Even when he had executed a bond on the day the writ was issued, it is held, (perhaps too stringently,) that the attachment should be quashed on motion, because it ante-dated the bond.[8] In such case, it has otherwise been held

See authorities therein, pp. 98–100.

[2] Marshall *v.* Alley, 25 Tex. 342.

[3] Chittenden *v.* Hobbs, 9 Iowa, 417.

[4] Searcy *v.* Platte County, 10 Mo. 269; Haris *v.* Trapp, 2 Nott & McCord, (S. C.) 130; Paul *v.* Ward, 21 Ind. 211.

[5] Hughes *v.* Stinnett, 9 Ark. 211; Wright *v.* Ragland, 18 Tex. 289; Bank of Augusta *v.* Conrey, 28 Miss. 667; Wheeler *v.* Slavens, 21 Miss. 623; Brash *v.* Wielarsky, 36 How, Pr. 253.

[6] Erwin *v.* Commercial Bank, 3 La. Ann. 186; Ford *v.* Hurd, 4 S. & M. 683; Tiffany *v.* Lord, 65 N. Y. 310; Van Loon *v.* Lyons, 61 Id. 22; Davis *v.* Marshall, 14 Barb. 96; Kelly *v.* Archer, 48 Id. 68; Bank of Alabama *v.* Fitzpatrick, 4 Humph. 311; Stevenson *v.* Robbins, 5 Mo. 18; Kellogg *v.* Miller, 6 Ark. 468; Osborne *v.* Schiffer, 37 Tex. 434; Benedict *v.* Bray, 2 Cal. 251; Hisler *v.* Carr, 34 Id. 641.

[7] Boyd *v.* Boyd, 2 Nott & McCord, (S. C.) 125.

[8] Hucherson *v.* Ross, 2 A. K. Marshall, (Ky.) 349.

that the proper remedy is a plea in abatement and not a motion to quash.[1] If the bond and writ bear equal date, the attachment should be sustained.[2]

Though a bond may be executed and filed before the issuance of the writ, if it is fatally defective, the attachment may be dissolved,[3] unless the plaintiff has the right to amend and proceeds to do so.[4]

Such defects in bonds, their execution, filing, etc., or omissions of proper sureties thereto, constitute good grounds for quashing. Thus, if the bond is not given by the plaintiff,[5] or by his agent or attorney when, expressly or impliedly, the law allows such representative of the plaintiff to execute the bond, but is made and signed by a stranger, the attachment may be quashed for lack of bond. So also if the surety or sureties are shown to be not such as the law requires with respect to their number, residence, solvency, ability to pay, etc.[6] So also if the amount of the obligation is not as great as the statute requires.[7]

The court cannot look beyond the face of the bond itself,

[1] Didier *v.* Galloway, 3 Ark. 501.

[2] McKenzie *v.* Buchan, 1 Nott & McCord, (S. C.) 205.

[3] Root *v.* Monroe, 5 Blackf. (Ind.) 594; Budsong *v.* Sledge, 8 Ga. 521; Work *v.* Titus, 12 Fla. 628; Gallager *v.* Coggswell, 11 Id. 127; Homan *v.* Brinckerhoff, 1 Denio, (N. Y.) 184; Rochefeller *v.* Hoysradt, 2 Hill, (N. Y.) 616.

[4] Conklin *v.* Harris, 5 Ala. 213; Jackson *v.* Stanley, 2 Id. 326; Planters' and Merchants' Bank *v.* Andrews, 8 Porter, (Ala.) 404; Lowe *v.* Derrick, 9 Id. 415; Oliver *v.* Wilson, 29 Ga. 642; Irvin *v.* Howard, 37 Id. 18; Tevis *v.* Hughes, 10 Mo. 380; Wood *v.* Squires, 28 Id. 528; Beardsley *v.* Morgan, 29 Id. 471; Henderson *v.* Drace, 30 Id. 358; Jasper Co. *v.* Chenault, 38 Id. 357; McDonald *v.* Fist, 53 Id. 343; Lea *v.* Vail, 3 Ill. 473; Cummings *v.* Denny, 6 Mo. App. 602. In this last case it was held that an attachment suit should not be dismissed for insufficient bond till opportunity for filing another has been given.

[5] Jones *v.* Anderson, 7 Leigh, 308; Ford *v.* Hurd, 12 Miss. 683; Myers *v.* Lewis, 1 McMullen, 54; Mantz *v.* Hendley, 2 Hen. & Mun. 308.

[6] McCook *v.* Willis, 28 La. Ann. 448: (one surety non-resident.) Jackson *v.* Stanley, 2 Ala. 326; Lokett *v.* Neufville, 55 Ga. 454.

[7] Brown *v.* Whiteford, 4 Rich. 327; Young *v.* Gray, Harper, 38; Marnine *v.* Murphy, 8 Ind. 272; Martin *v.* Thompson, 3 Bibb. 252; Williams *v.* Barrow, 3 La. 57; Pope *v.* Hunter, 13 Id. 306; Jackson *v.* Warwick, 17 Id. 436; Graham *v.* Burckhalter, 2 La. Ann. 415; Fellows *v.* Dickens, 5 La. Ann. 131; Starr *v.* Lyon, 5 Ct. 538; Davis *v.* Marshall, 14 Barb. 96; Gal-

upon a motion to quash for insufficiency as to the amount, number of sureties, form of the obligation, etc., where evidence *aliunde* is not allowed by the attachment statute or practice in the State.[1]

Where the bond is not fatally defective, but is such as to protect the defendant, and is in substantial compliance with the statute requiring it, and is amendable, courts will not because of its defects dissolve the attachment upon motion.[2] Nor will they dissolve it because of harmless surplusage written in the bond;[3] nor for want of a seal where the statute does not make it essential.[4]

There is no writ commanding an officer to seize property in a proceeding against a thing irrespective of persons; but in a proceeding against a thing as the property of a particular person who is already personally charged with indebtedness, with the purpose of rendering it indebted by creating a lien upon it, there must be a writ or warrant issued to the officer, commanding him to seize any property of that particular person. An attachment depends, therefore, upon the writ. Without a writ, it may be quashed on motion, since no one can lawfully attach property under the attachment statutes, without a judicial order to do so. Anybody may seize preliminarily to the libel of goods or other property, on the ground of forfeiture, to have the *status* judicially declared, but only an officer duly authorized by a mandate of court can seize a debtor's property at the suit of a creditor to have a lien put on it and enforced. An attachment may be quashed if it appears from the record that there was no writ, or no writ issued by the court directly or through its minister, the clerk; if there was a writ which was not in com-

lagher *v.* Cogswell, 11 Fla. 127; Benedict *v.* Bray, 2 Cal. 251; Saulter *v.* Butler, 10 Ga. 510; Thompson *v.* Arthur, Dudley, 253; Briggs *v.* Smith, 13 Tex. 269.

[1] Spear *v.* King, 14 Miss. 276.

[2] Knox *v.* Atterburg, 3 Dana, (Ky.) 580; Smith *v.* Pearce, 6 Munf. (Va.) 585; Plumpton *v.* Cook, 2 A. K. Marshall, (Ky.) 450; Leach *v.* Thomas, 2 Nott & McCord, (S. C.) 110; Howard *v.* Oppenheimer, 25 Md. 350; Dean *v.* Oppenheimer, Id. 368; O'Neal *v.* Owens, 1 Haywood, (N. C.) 362; Frankel *v.* Stern, 44 Cal. 168.

[3] Shockley *v.* Davis, 17 Ga. 175; Kalm *v.* Herman, 3 Ga. 266; Bourne *v.* Hocker, 11 B Mon. 21; Steamboat Napoleon *v.* Etter, 6 Ark. 103; Fellows *v* Miller, 8 Blackford, 231; Ranning *v.* Reeves, 2 Tenn. Ch. 263.

[4] Gasquet *v.* Collins, 57 Tex. 340.

pliance with the statute; if, though the attachment statute may not have been violated so far as it literally requires a writ, there has been a violation of its spirit; if, though the statute mentions nothing of a writ, the attachment has been executed without one; if the writ itself was deficient—failing to give full authority to the officer to attach; if it was fatally defective in form; if it was illegally issued—on Sunday—on a legal holiday—at some time not allowed by law; if it was not properly signed by the judge or clerk, when that is imperative; and if not properly sealed, when a seal is rendered indispensable by the statute. In brief it may be said that an attachment may be quashed or vacated, either for fatal defects in the matter or form of the writ itself or for irregularities in its issue, appearing of record.[1]

To take advantage of a defective execution of the writ and make it the reason for quashing, the defendant must find evidence of it in the return. However erroneous the sheriff's course may have been when attaching property of the defendant, only what the record shows to have been irregular and erroneous can be properly assigned as ground for the motion to set the attachment aside for patent errors.

If it appears from the return that no property has been attached, or validly attached, the suit is at an end so far as it is against property, (or rather, has never fully come into being,) and the court is without jurisdiction over the property of the personal debtor.[2]

[1] Mansur *v.* Coffin, 54 Me. 314; Coward *v.* Dillinger, 56 Md. 59; Reynolds *v.* Damrell, 19 N. H. 394; Patrick *v.* Solinger, 9 Daly, (N. Y.) 149; Park *v.* Hamron, 14 Vt. 211; Paine *v.* Tilden, 20 Vt. 554; Curry *v.* Woodward, 50 Ala. 258; Woodly *v.* Shirley, Minor, (Ala.) 14; O'Farrell *v.* Heard, 22 Minn. 189; Musgrave *v.* Brady, 1 Morr. (Iowa,) 456; Barber *v.* Swan, 4 Greene, (Iowa,) 352; Hagan *v.* Burch, 8 Iowa, 309; Byrd *v.* Hopkins, 16 Miss. 441; Hanson *v.* Dow, 51 Me. 165; Neally *v.* Judkins, 48 Id. 410; Osgood *v.* Holyoke, Id. 410; Saco *v.* Hopkinton, 29 Id. 268; Askew *v.* Stevenson, Phill. (N. C.) L. 181; Dean *v.* Garnet, 1 Duv. (Ky.) 408; Bourine *v.* Hocker, 11 B. Mon. 23; Greenvault *v.* F. & M. Bank, 2 Doug. (Mich.) 498; Philpott *v.* Newman, 11 Neb. 299; Blair *v.* Shew, 24 Kan. 280.

[2] Rose *v.* Whaley, 14 La. Ann. 374; Williams *v.* Skipwith, 34 Ark. 529; Reynolds *v.* Horn, 4 La. Ann. 187; Clay *v.* Neilson, 5 Rand. (Va.) 596; Seers *v.* Blakesly, 1 Root, (Ct.) 54; Embra *v.* Silliman, Id. 128.

If the return gives no description of property sufficient to identify it, and it is so situated that the possession of it by the sheriff is not sufficient to distinguish it from other property not attached, (as when it is a part of a mass, or is intermixed with other goods, or is not susceptible of manipulation,) the attachment ought to be set aside for want of description. It is no ground, however, when goods are attached and held, and kept separately so as to be forthcoming upon judgment, that they are not specifically described.[1]

The essential requirements of the statute, with respect to the levy, must be observed, and reported in the return, under pain of nullity. If posting at the court-house is a statutory essential, omission to make an official return that a copy of the attachment was there posted is cause for quashing attachment.[2]

There is also good cause, when there is record evidence of the violation of a statute making a return of the value of attached property essential;[2] or the time of attaching; or the person served; or the officer serving; or the publication, or any other matter made essential. A return by an unauthorized officer is not cause for dismissing the personal action.[3]

The violation or neglect of statutory requirements may appear as well by the omission of any mention of them as by a statement in the return. The record shows what has not been performed as well as what has been done. Its silence with reference to an essential act in making the levy is sufficient evidence of its neglect, so that the omission may be assigned as error patent upon the record and made a ground for a motion to quash the attachment.

If, however, something has been wrongfully done, of such a character as to vitiate the levy, but which does not affirmatively appear of record, nor can be inferred therefrom, such as undue force or violence in the execution, fraud or unlawful strategy in making the seizure, attaching beyond the bounds of the court's jurisdiction, etc., the defendant's remedy is not the motion to quash for patent errors.

[1] Green *v.* Payne, 1 Ala. 235.
[2] Wilson *v.* Ray, T. U. P. Charlt. (Ga.) 109.
[3] Bates *v.* Crow, 57 Miss. 676.

In the practice of several of the States, amendments are allowed, even after a motion to quash has been filed, so as to defeat the motion. Both the petition and the affidavit are there amendable at that stage, if they are merely defective and not wholly inadmissible. If amendable, though not yet amended, motions to quash have been refused.[1] But this is not the general practice; and it may be added that nowhere can the absence of an affidavit be supplied, after rule to vacate attachment ment for the want of one.[2]

It has even been held that an attachment suit should not be dismissed on account of the insufficiency of the bond without first giving the plaintiff opportunity for filing a new one,[3] though this seems contrary to the generally received doctrine that a sufficient bond, filed before, or simultaneously with the issuance of the writ, is essential to the validity of the attachment.

Sec. 3. Quashing on Evidence beyond the Record.

An attachment, regularly issued, legal on its face, strictly in conformity to statute, may be based on false allegations. The court may have acted in the rightful exercise of jurisdiction, and the affidavit may have presented such a statement of facts with regard to the parties, the character of the debt, and the grounds for attaching, that the writ could not have been legally refused, yet there may remain a good defense against the suit to be established by evidence beyond the record. Especially is

[1] Branch *v.* Frank, 81 N. C. 180; Magoon *v.* Gillett, 54 Iowa, 54; Hathaway *v.* Davis, 33 Cal. 161; Tarkinton *v.* Broussard, 51 Tex. 550, and Pierce *v.* Bell, 21 Id. 690, both with reference to the petition only; Campbell *v.* Whetstone, 4 Ill. 361; Cutter *v.* Richardson, 125 Mass. 72; (See Warren *v.* Lord, 131 Mass. 560; Knight *v.* Dorr, 19 Pick. 48; Seeley *v.* Brown, 14 Id. 177;) Graves *v.* Cole, 1 Greene, (Iowa,) 405; Mendes *v.* Freiters, 16 Nev. 388; Fitzpatrick *v.* Flannagan, 106 U. S. 650; Henderson *v.* Dace, 30 Mo. 358; Drew *v.* Dequindre, 2 Doug. (Mich.) 93, Lawton *v.* Keil, 51 Barb. 30; 34 How. Pr. 465. See Atkins *v.* Womeldorf, 53 Iowa, 153; Murdough *v.* McPherrin, 49 Iowa, 479. *Contra:* Marx *v.* Abraham, 53 Tex. 264, as to the affidavit.

[2] McReynolds *v.* Neal, 8 Hump. (Tenn.) 12.

[3] Henderson *v.* Drace, 30 Mo. 358; Tevis *v.* Hughes, 10 Id. 380; Kissam *v.* Marshall, 10 Abb. Pr. 424.

this true when the court, in considering an application, is confined to the plaintiff's *ex parte* statements, and not required or permitted to investigate his averments by evidence beyond the affidavit.

Under such circumstances, the writ, though issued legally is issued improvidently. It will hold good unless it is, in some form, put at issue; but if, upon proper proceeding, the falsity of the plaintiff's allegations or the illegality of the proceeding is made to appear by due proof, the suit may be abated.[1]

It requires a general appearance to enable the defendant to take action for the dissolution of attachment on grounds other than those apparent upon the record.[2] After such appearance, he may assign such grounds as that the plaintiff had obtained judgment and issued execution on the same demand in another State;[3] that another suit on the same cause of action is pending between the parties;[4] that a second writ of attachment has been sued out by the plaintiff against the defendant, on the same demand in the same county;[5] that an attachment was sued out by the plaintiff against the defendant, on the same demand, in another State, and has been dissolved by bonding;[6] that the attachment is devised merely to defeat the demand of another creditor;[7] and, as will hereafter be more particularly shown, he may traverse the affidavit and test its truth, and urge any grounds against the bond, the writ, the seizure, the non-compliance with the statute in any essential particular or any other cause, not necessarily confining himself to defects patent upon the record.

His right to oppose the attachment in some form cannot be denied. Could he not exercise this right by some method he would be cut off from all defense of the ancillary suit. Such denial would be as obviously unjust as the refusal of defense to

[1] Lovier *v.* Gilpen, 6 Dana, (Ky.) 321.

[2] Whiting *v.* Budd, 5 Mo. 443; Evans *v.* King, 7 Mo. 443.

[3] Downing *v.* Phillips, 4 Yeates, 274.

[4] James *v.* Dowell, 15 Miss. 333; McKinsey *v.* Anderson, 4 Dana, (Ky.) 62.

[5] Harris *v.* Linnard, 9 N. J. L. 58.

[6] Clark *v.* Wilson, 3 Wash. C. C. 560; Fisher *v.* Consequa, 2 Id. 382.

[7] Reed *v.* Ennis, 4 Abb. Pr. 393.

any litigant sued in an ordinary action. The general right exists, whether recognized in the attachment statute or not; it is independent of statute; it is protected by the constitution and recognized by courts everywhere.

But the method of opposing attachments is different under the statutes and practice of the different States. Whether such opposition must be *in limine* or upon the trial of the merits of the cause is properly a question for statute regulation; or, in the absence of it, for settlement according to the established practice in the State where the suit is instituted. It might everywhere be relegated to the merits; but it has generally been found more convenient and practicable to dispose of it preliminarily and summarily,[1] since such practice often saves the court and the litigants from the labor of a protracted trial. If good grounds exist for dissolving the attachment, the sooner they are passed upon the better for all parties concerned.

The principal methods in use for dissolving an attachment on grounds *dehors* the record, are the motion or rule to dissolve, and the plea in abatement.

The traverse of the affidavit on such grounds may be under motion;[2] and it may be under a plea in abatement,[3] according to the practice in different States.

Whether by plea, or by motion on grounds *dehors* the record

[1] Lindsley *v.* Malone, 23 Pa. St. 24; Hatry *v.* Shuman, 13 Mo. 547; Cannon *v.* McManus, 17 Mo. 345. See Hawkins *v.* Albright, 70 Ill. 87.

[2] Brauson *v.* Shinn, 13 N. J. L. 250; Boyes *v.* Coppinger, 2 Yeates, (Pa.) 277; Lambden *v.* Bowie, 2 Md. 334; Gover *v.* Barnes, 15 Md. 576; Hardesty *v.* Campbell, 29 Md. 533; Clarke *v.* Meixsell, 29 Md. 221; Wheeler *v.* Degnan, 2 Nott. & McCord, (S. C.) 323. (But see Havis *v.* Trapp, Id. 130, and Shrewsbury *v.* Pearson, 1 McCord, 331;) Bank of Commerce *v.* Rutland, &c. R. R. Co. 10 How. Pr. 1; N. Y. & Erie Bank *v.* Codd, 11 Id. 221; Furman *v.* Walter, 13 Id. 348; Boscher *v.* Roullier, 4 Abb. Pr. 396; Bower *v.* Town, 12 Mich. 230.

[3] Chenault *v.* Chapron, 5 Mo. 438; Swan *v.* O'Fallon, 7 Mo. 231; Hatry *v.* Shuman, 13 Mo. 547; Cannon *v.* McManus, 17 Mo. 345; Excelsior Fork Co. *v.* Lukens, 38 Ind. 438; Voorhies *v.* Hoagland, 6 Blackf. 232; Abbott *v.* Warriner, 7 Id. 573; Garrett *v.* Tirmen, 8 Miss. 465; Moore *v.* Hawkins, 6 Dana, (Ky.) 289; Lovier *v.* Gilpin, Id. 321; Meggs *v.* Shaffer, Hardin, (Ky.) 65; Goldsticker *v.* Stetson, 21 Ala. 404; Kirkman *v.* Patton, 19 Ala. 32; Lowry *v.* Stowe, 7 Port. (Ala.) 483; Dunn *v.* Myers, 3 Yerg. (Tenn.) 414; Isaacs *v.* Edwards, 7 Humph. (Tenn.) 465; Foster *v.* Hall, 4 Id. 346; Harris *v.*

after the general appearance of the defendant as a party to the suit, the principles involved are much the same; and, in a general treatise designed for all the States, it is not important to distinguish nicely between the two methods. Every practitioner is conversant with the method of his State, and to him the important matter is the general subject of dissolution.

In Alabama, the plea in abatement is the proper means when the affidavit has not been verified or subscribed, and when not made before the proper justice,[1] and when there is no bond or no affidavit.[2] Though there be an affidavit and bond, if there is a variance between them and the writ, the defendant, to take advantage of it, must plead in abatement.[3] The affidavit should be set out on oyer, when the defendant seeks to abate the attachment for defects therein.[4]

In Maryland, objection to attachment proceedings, on the ground that they do not show compliance with statute, may be by motion to quash, by motion in arrest of judgment after verdict, and may be urged on appeal.[5]

In Arkansas, it was held that the proper judgment sustaining a plea in abatement of *insufficiency* of the affidavit was that the suit abate and that the defendant recover costs;[6] but the truth of the affidavit, (it was held,) cannot be disputed by such plea.[7] It lies, however, for want of the bond, or for want of one not executed by the plaintiff or some person duly author-

Taylor, 3 Sneed, 536; Leak *v.* Moorman, Phill. (N. C.) L. 168; House *v.* Hamilton, 43 Ill. 185; Boggs *v.* Bindskoff, 23 Ill. 66; Eddy *v.* Brady, 16 Ill. 306; Pullian *v.* Nelson, 28 Ill. 112; Archer *v.* Claflin, 31 Ill. 306; White *v.* Wilson, 10 Ill. 21; Parsons *v.* Case, 45 Ill. 296; Hill *v.* Cunningham, 25 Tex. 25; Armstrong *v.* Blodgett, 33 Wis. 284; Mantz *v.* Hendley, 2 Hen. & M. (Va.) 308; Bank of the Valley *v.* Bank of Berkely, 3 W. Va. 386. In Arkansas it has been held that the truth of the affidavit cannot be disputed by plea in abatement: Taylor *v.* Richards, 9 Ark. 378; Mandell *v.* Peet, 18 Ark. 236. (But see Kellogg *v.* Miller, 6 Ark. 468; Hellman *v.* Fowler, 24 Ark. 235.) Nor can the truth be thus questioned in Alabama when the attachment is judicial: Garner *v.* Johnson, 22 Ala. 494.

[1] Lowry *v.* Stowe, 7 Port. 483; Ellison *v.* Mounts, 12 Ala. 472.

[2] Kirkman *v.* Patton, 19 Ala. 32.

[3] Goldsticker *v.* Stetson, 21 Ala. 404.

[4] Banks *v.* Lewis, 4 Ala. 599.

[5] Coward *v.* Dillinger, 56 Md. 59.

[6] Hellman *v.* Fowler, 24 Ark. 235.

[7] Taylor *v.* Richards, 9 Ark. 378; Mandell *v.* Peet, 18 Ark. 236.

ized by him;[1] but not if the bond is signed by sureties and is binding on the plaintiff who has ratified it, though he may not have signed it.[2]

In Illinois, affidavits are traversed by the plea in abatement.[3] For the purposes of the traverse, the pleader need not pray oyer of the affidavit, since it is of record. Such plea may be met by demurrer; but, if the demurrer be overruled there can then be no reply to the plea, and the writ must be quashed.[4]

The plea does not lie on the ground of the *insufficiency* of the affidavit, in that State; it is a waiver of all patent defects. Even if it should be withdrawn or stricken from the file, after having been pleaded, the defendant cannot afterwards attack the affidavit for apparent defects.[5] But if the plaintiff has amended and averred new matter, the defendant may plead in abatement to the additional allegations,[6] putting their truth at issue.

The plea may be interposed when the affidavit alleges that the debtor has departed from the State with the intention of removing his property from it to the injury of his creditors;[7] that he is a non-resident;[8] and, generally, any traversable ground may be met by this plea.

In Mississippi, all the material allegations of the affidavit must be traversed under a plea in abatement to an attachment against an absconding debtor.[9] The defendant may file the plea when he appears and replevies the attached property.[10]

In Florida, when the defendant denies under oath all the allegations of the plaintiff, the *onus* is on the plaintiff not only to prove the indebtedness, but also to sustain the grounds of the attachment.[11] The *onus* is on the plaintiff when the affidavit is traversed.[12]

[1] Kellogg *v.* Miller, 6 Ark. 468.

[2] Taylor *v.* Richards, 9 Ark. 378.

[3] Boggs *v.* Bindskoff, 23 Ill. 66.

[4] Eddy *v.* Brady, 16 Ill. 306.

[5] Archer *v.* Claflin, 31 Ill. 306.

[6] Id.

[7] Eddy *v.* Brady, 16 Ill. 306; House *v.* Hamilton, 43 Ill. 185.

[8] Parsons *v.* Case, 45 Ill. 296: held, that a plea that the defendant was not a non-resident when the writ was issued was equivalent to a plea that he was not such when the affidavit was made;—the writ and affidavit bore even date.

[9] Garrett *v.* Tirman, 8 Miss. 465.

[10] James *v.* Dowell, 15 Miss. 333.

[11] Meinhard *v.* Lillienthal, 17 Fla. 501.

[12] Colby *v.* Gould, 16 Fla. 167.

In Missouri, the truth of the affidavit is tested by this plea;[1] and objections thereto, as well as objections because of variances, etc., are waived by answer to the merits.[2]

In North Carolina, defects of process are waived by answer;[3] they should be opposed by plea in abatement.[4]

The insufficiency of the affidavit to show the amount of the debt, and the falsity of it in alleging the non-residence of the debtor, are to be pleaded in abatement, and would be waived by answer, as held in Tennessee.[5] Whether the defendant was about to remove from the State as charged, is matter for the plea;[6] and so is any ground upon which the writ is issued.[7]

The plea that the defendant never absconded, filed against the affidavit charging that he had, is in abatement.[8] If the ground is that the debtor was about to move property out of the State, he may meet it with the plea that the property was exempt from attachment.[9]

Where the defendant may, upon special motion to vacate for falsity of the charge, offer affidavits to disprove the grounds on which the writ was issued, the plaintiff is allowed to introduce further evidence by way of affidavits to support his position and rebut the defendant's evidence; and the court, in consideration of what is thus adduced on both sides, sustains or sets aside the writ.[10] Such motion should be made at the first opportunity, and before issue joined on the merits of the suit.

[1] Chenault *v.* Chapron, 5 Mo. 428; Swan *v.* O'Fallon, 7 Id. 231; Dider *v.* Courtney, Id. 500; Switzer *v.* Carson, 9 Id. 740.

[2] Hatry *v.* Shuman, 13 Mo. 547; Cannon *v.* McManus, 17 Mo. 345; Henderson *v.* Drace, 30 Mo. 358.

[3] Price *v.* Sharp, 2 Ired. L. 417.

[4] Leak *v.* Moorman, Phill. L. 168.

[5] Foster *v.* Hall, 4 Humph. 346.

[6] Isaacs *v.* Edwards, 7 Humph. 465.

[7] Harris *v.* Taylor, 3 Sneed, 536.

[8] Mantz *v.* Hendley, 2 Hen. & M. (Va.) 308; Bank of the Valley *v.* Bank of Berkely, 3 W. Va. 386.

[9] Hastings *v.* Phœnix, 59 Iowa, 394.

[10] Nelson *v.* Munch, 23 Minn. 229; Shadduck *v.* Marsh, 1 Zab. (N. J.) 434; St. Amant *v.* Beixcedon, 3 Sandf. (N. Y.) 703; Day *v.* Bennett, 3 Harrison, (N. J.) 287; Cammann *v.* Tompkins, 1 Code R. 12. In New York such motion may be referred to a referee; and when he had not reported before judgment was rendered in the case, the court afterwards heard the motion: Thompson *v.* Culver, 15 Abb. Pr. 97. But the motion can be made only before judgment: Swezy *v.* Bartlett, 3 Abb. Pr. (N. S.) 444; Lawrence *v.* Jones, 15 Abb. Pr. 110.

Whether the right thus to contest the truth of the plaintiff's affidavit is conferred by statute, or is exercised independently of it, the practice is much the same where affidavits or other evidence beyond the papers of the case are receivable upon the hearing; and the right need not necessarily be statutory.[1]

In order to entitle the mover to introduce testimony *dehors* the record, he must have laid the proper ground therefor.[2] If he confines his motion to the original papers, he cannot go beyond them in offering his evidence, nor can the plaintiff introduce new affidavits to sustain his attachment.[3] It is only when the mover assigns ground beyond the record and presents affidavits or other evidence beyond the papers, that the plaintiff in the case—defendant in rule—may offer affidavits additional to that upon which the attachment was issued.[4] Such additional testimony should be confined to the support of the ground or grounds on which the attachment was issued, and not extended to the maintenance of the attachment on other grounds; but it may be offered to show facts posterior to the original application tending to sustain it, or to show a subsequent change in the relations of the parties.[5] It has been held, however, that the deposition of the plaintiff himself, taken after the issuance of the writ, is inadmissible on such rule.[6]

Where the charge was that the debtor was about to remove

[1] Philipsburgh Bank *v.* Lackawanna R. R. Co. 3 Dutch. 203; City Bank *v.* Merritt, 1 Green, (N. J.) 131; Vienne *v.* McCarty, 1 Dall. 165; Campbell *v.* Morris, 3 Har. & McH. (Md.) 535; Hardesty *v.* Campbell, 29 Md. 533; Gover *v.* Barnes, 15 Md. 576; Lambden *v.* Bowie, 2 Md. 334; Boyes *v.* Coppinger, 1 Yeates, 277; Branson *v.* Shinn, 1 Green, (N. J.) 250.

[2] Dickinson, *v.* Barnes, 3 Gill, (Md.) 485.

[3] Steuben Co. Bank *v.* Alberger, 56 How. Pr. 345; Brewer *v.* Tucker, 13 Abb. Pr. 76; Wilson *v.* Briton, 6 Id. 33; Genin *v.* Tompkins, 12 Barb. 265.

[4] Morgan *v.* Avery, 7 Barb. 656; St. Armant *v.* De Beixcedon, 3 Sandf. 703; Furman *v.* Walter, 13 How. Pr. 348; Gasherrie *v.* Apple, 4 Id. 64; Bank of Commerce *v.* Rutland &c. R. R. Co. 10 Id. 1; New York & Erie Bank *v.* Codd, 11 Id. 221, and see the cases cited in the previous note, and Talbot *v.* Pierce, 14 B. Mon. (Ky.) 195; Eldridge *v.* Robinson, 4 Serg. & Rawle, (Pa.) 548.

[5] Dickinson *v.* Benham, 12 Abb. Pr. 158; 20 How. Pr. 343. See Dynes *v.* Robinson, 11 Iowa, 137.

[6] Cowlon *v.* DeLisle, 1 Browne, (Pa.) 291. See Gibson *v.* McLaughlin, Id. 292.

his property from the State to defraud creditors, he was permitted to testify and deny intent to defraud, on trial of his motion to dissolve the attachment.[1] When the ground is the non-residence or removal of the debtor, the defendant should clearly disprove it, to have the attachment dissolved.[2]

On a motion to dissolve, made by a partner when attachment had been sued out against him on the ground of his non-residence, by his co-partner, on an unsettled partnership account, the court held that it might inquire whether the cause of action arose wholly within the State.[3]

The defendant who appears to contest the truth of the affidavit, must adduce some proof of its falsity before the plaintiff can be obliged to add other evidence to that of the affidavit itself. The burden of proof is upon the plaintiff-in-rule in such case, in the first instance;[4] but where the affidavit is not considered as evidence at all on the trial of such a rule, the *onus* is on the defendant-in-rule to establish the grounds of his attachment.[5] And where he attempts to do so by the submission of additional affidavits, the plaintiff-in-rule may meet them by counter affidavits.[6]

On the trial of a rule to quash, when affidavits may be read

[1] Hyde *v.* Nelson, 11 Mich. 353. In New York, evidence *aliunde* is admissible to sustain or disprove allegations of the affidavit respecting fraudulent removal or disposition of property: Livermore *v.* Rhodes, 27 How. Pr. 506; Dickinson *v.* Benham, 12 Abb. Pr. 158; O'Reilly *v.* Feel, 37 How. Pr. 272; Swezey *v.* Bartlett 3 Abb. Pr. 444.

[2] Henderson *v.* Travis, 6 La. Ann. 174; Gilbert *v.* Hollinger, 14 Id. 441; Lewis *v.* Wright, 3 Bush. (Ky.) 311; Degnan *v.* Wheeler, 2 Nott & McCord, (S. C.) 323; Shrewsbury *v.* Pearson, 1 McCord, (S. C.) 331; Brandon *v.* Shinn, 13 N. J. L. 250; Hill *v.* Whitney, 16 Vt. 461. If the debt claimed of a non-resident is not due, the attachment may be dissolved on motion, in Kansas: Pierce *v.* Myers, 28 Kan. 364.

[3] Stone *v.* Boone, 24 Kan. 337.

[4] Simons *v.* Jacobs, 15 La. Ann. 425; Offut *v.* Edwards, 9 Rob. (La.) 90; Brumgard *v.* Anderson, 16 La. 341; Moore *v.* Angiolette, 12 Martin, (La.) 532. But see Sublett *v.* Wood, 76 Va. 318. The attaching creditor must first show that sufficient cause existed for issuing the attachment.

[5] Conner *v.* Commissioners of Rice Co. 20 Kan. 575; Coston *v.* Paige, 9 Ohio St. 397; Hernsheim *v.* Levy, 32 La. Ann. 340; Ellison *v.* Tallon, 2 Neb. 14; Smith *v.* Easton, 54 Md. 138.

[6] Swezey *v.* Bartlett, 3 Abb. Pr. N. S. 444; Lawrence *v.* Jones, 15 Abb. Pr. 110; Phillipsburg Bank *v.* Lack-

by both parties, the question is whether there is legal basis for the attachment: not whether it was rightfully issued on the papers. The case is still open to be tried upon the merits.[1] On such a rule, if the attaching creditor fails to sustain the facts stated in his affidavit, after the *onus* has been thrown upon him, the attachment will be quashed.[2] Though the writ was legally granted on the plaintiff's oath to his belief, the existence of reasons for belief is not necessarily in question on the trial of a motion to dissolve, but whether the fact really was as the plaintiff believed it to be.[3]

Where the evidence, *pro* and *con*, is not confined to affidavits, the defendant may cross-examine the plaintiff.[4] The burden of proof is on the defendant when the fraudulent contracting of the debt sued on is the plaintiff's ground for attaching.[5] When the issue is the wrongful suing out of the writ based on an alleged sale to defraud creditors, the attachment-defendant has been held incompetent to testify to the *intent* with which he disposed of his property.[6]

The principal or personal action, (when the debtor has been served or has appeared,) is not dismissed by the defeat of the ancillary suit.[7] If there has been no service or appearance, there is really no personal suit, and the quashing of the attachment ends the whole case.[8] It does not acquit the debtor of his obligation, if such exists, since he may be sued therefor thereafter.[9] Its effect is confined to the questions adjudicated by the ruling upon the motion or plea; and it is final as to

awanna R. R. Co. 27 N. J. L. 206; Shadduck *v.* Marsh, 1 Zab. (N. J.) 434; Day *v.* Bennett, 3 Harrison, (N. J.) 287; Bronson *v.* Shinn, 1 Green, (N. J.) 259; City Bank *v.* Merritt, Id. 131; Hodson *v.* Tootle, 28 Kan. 317.

[1] Hermann *v.* Amédée, 30 La. Ann. 393; Miller *v.* Chandler, 29 La. Ann. 88; O'Reilly *v.* Freal, 37 How. Pr. 272; Genin *v.* Tompkins, 12 Barb. 265; Boscher *v.* Roullier, 4 Abb. Pr. 396. See Furman *v.* Walter, 13 How. Pr. 348; Vienne *v.* McCarty, 1 Dall. 154.

[2] Ridgway *v.* Smith, 17 Ill. 33.

[3] Blanchard *v.* Brown, 42 Mich. 46.

[4] Tyler *v.* Safford, 24 Kan. 580.

[5] Keith *v.* Stetter, 25 Kan. 100; Simon *v.* Stetter, Id. 155.

[6] Selz *v.* Belden, 48 Iowa, 451.

[7] Bundrem *v.* Denn, 25 Kan. 430; Hills *v.* Moore, 40 Mich. 210; Hermann *v.* Amédée, 30 La. Ann. 393; Miller *v.* Chandler, 29 Id. 88.

[8] Watson *v.* Simpson, 15 La. Ann. 709; Kendall *v.* Brown, 7 Id. 668.

[9] Hill *v.* Culan, 1 Grant, (Pa.) Cas. 463.

them, unless overruled on appeal.[1] The effect of making the rule absolute is to discharge the attached property;[2] and upon such ruling, appeal may be taken or a writ of error sued out, as the practice may be in any State. Refusal to quash is not usually a matter for such writ or for appeal,[3] but the practice is not uniform.[4] When a motion is overruled, the defendant should take exception at once, if he wishes it reviewed;[5] but the ruling may be assigned as error on appeal.[6]

The defendant has a right to the return of his property, when he, upon legal grounds, has the attachment dissolved pending the main action; and the court has no power to assume that he has lost such right because there are junior attachments pending against the property sought to be released.[7]

Sec. 4. Traverse after Dissolution by Bonding.

After the dissolution of the attachment and the release of the property, by virtue of a bond conditioned to pay whatever the plaintiff may recover, can there be, in the case itself, any further questioning of the validity of the attachment? The negative has been held: but it has not been the doctrine everywhere, and the affirmative seems the preferable answer. Reasoning aside from the decisions, it may be remarked that great injustice might be done if the invalidity of the attachment could only be shown prior to the execution of such bond. The circumstances may be urgent; the immediate possession of the attached property may be very important to the defendant; his instant recovery of it might be essential to the keeping of his business engagements; his credit as a merchant or business man might depend upon regaining his attached property at once; his attached stock might be rapidly declining in a time of panic;

[1] Danforth *v.* Rupert, 11 Iowa, 547; Rancher *v.* McElhenny, 11 Mo. App. 434.

[2] Currens *v.* Ratcliffe, 9 Iowa, 309.

[3] Massey *v.* Walker, 8 Ala. 167; Ellison *v.* Mounts, 12 Id. 472.

[4] Allowed in Texas: Dawson *v.* Miller, 20 Tex. 171; Messner *v.* Lewis, Id. 221.

[5] Schlatter *v.* Hunt, 1 Mo. 651.

[6] Wells *v.* St. Dizier, 9 La. Ann. 119.

[7] Schall *v.* Bly, 43 Mich. 401; State Bank of Fenton *v.* Whittle, 41 Id. 365; Sheldon *v.* Stewart, 43 Mich. 574.

his business as a newspaper publisher might admit of no delay in getting his press and other materials free from arrest—and yet the court might not be in session, the judge might be absent for months, no opportunity might be afforded for testing the validity of the attachment at once. What must he do? He may give a forthcoming bond, and his right thereafter to test the attachment is generally conceded. But suppose the attached thing consists of goods which he wishes to ship abroad for sale at once, to meet a good market: he cannot then consistently give a forthcoming bond. He might give it, with explanation to the surety and assent by him, but he is not obliged to do that, and, ordinarily, he could not consistently do that. It would be a violation of his engagement.

He is driven to the execution of a dissolution bond. But suppose the attachment is illegal; there is no affidavit, no bond, no valid writ, nothing that will bear test in the judicial crucible. Ought he not have the opportunity, when the court opens, to question the validity of the attachment? Whether the seizure has been in vacation or not; whether he could have taken a rule to dissolve before bonding or not, is there any good reason why he should not have the character of the attachment judicially ascertained, in the case, notwithstanding its dissolution by bonding? Is there any good reason why he should be relegated to his defense, (in case of a suit on the bond,) that the obligation taken by him and his surety was without valid consideration because of the illegality of the attachment?

It may be said that the dissolution bond put an end to the attachment suit. That is true; but it did not put an end to the personal suit; and it is in that remaining suit that the testing of the forced obligation to pay whatever may be recovered therein is to be had. It may be said that the defendant will be bound to pay whatever may be recovered against him, bond or no bond. That is true; but the obligation of the surety depends upon the validity of the bond, and the validity of the bond depends upon the legality of the attachment. The principal should protect his surety.

Not only in extreme cases, when the owner of the attached property is necessitated to procure its immediate release for

business purposes as above suggested, but in all cases there is reason for allowing the defendant to traverse the attachment after having given the dissolution bond; for the bonding is in a sense involuntary, compulsory, unwillingly executed.[1] The principal reason however is that the obligation assumed is with the unwritten *proviso* that the court has jurisdiction and that the attachment is valid; and while this might avail the obligors when sued upon the bond, after judgment, it ought also to be available to prevent the rendition of any immediate judgment against the surety in case the attachment can be shown to be void for want of jurisdiction or for any other cause.

Whether the defendant may thus resist and traverse the attachment after giving bond to dissolve it, and after it has really been thus dissolved, is a question that has been differently decided in different States. The affirmative has been very earnestly maintained.[2]

The U. S. Circuit Court, sitting in Arkansas, following the rulings of the Supreme Court of that State as in duty bound, and construing § 416 of its code, which requires that dissolution bonds shall be conditioned "to perform the judgment of the court," said that such bond "does not estop the defendant from traversing the affidavit for attachment and defending against the attachment in every respect as if such bond had not been executed and the property had remained in the hands of the officer"; and that if the attachment is not sustained, the plaintiff, though he recover judgment for his debt, cannot resort to the bond to compel payment of such judgment.[3]

[1] Vose *v.* Cockroft, 44 N. Y. 415.

[2] Lehman *v.* Berdin, 5 Dillon, 340; Singer Manuf. Co. *v.* Mason, Id 488; Delano *v.* Kennedy, 5 Ark. 457; Childress *v.* Fowler, 9 Id. 159; Wood *v.* Carleton, 26 Id. 662; Paihles *v.* Roux, 14 La. 83; Quine *v.* Mayers, 2 Rob. (La.) 510; Myers *v.* Perry, 1 La. Ann. 372; Brinegar *v.* Griffin, 2 Id. 154; Kendall *v.* Brown, 7 La. Ann. 668; Love *v.* Voorhies, 13 Id. 549; Bauer *v.* Antoine, 22 Id. 145; Edwards *v.* Prather, Id. 334; Claflin *v.* Baere, 57 How. Pr. 78; Bildersee *v.* Aden, 10 Abb. Pr. (N. S.) 163; Caldwell *v.* Colgate' 7 Barb. 253; Homan *v.* Brinkerhoff, 1 Denio, 184; Fortman *v.* Rottier, 8 Ohio St. 553; Alexander *v.* Jacoby, 23 Id. 358; Anet *v.* Albo, 21 Id. 349; Hoge *v.* Norton, 22 Kan. 374; Gass *v.* Williams, 46 Ind. 253.

[3] Lehman *v.* Berdin, 5 Dillon, 340.

The Supreme Court of South Carolina said in a comparatively recent case that the question, whether the giving of a dissolution bond is a waiver of the right to set aside the attachment, was before them for the first time. It is remarkable that they had not previously encountered this mooted inquiry. After reviewing numerous cases, *pro* and *con*, they came to the conclusion that the bonding was no waiver.[1]

It would seem that this view should universally prevail where the character of the attachment suit is recognized as being against property in effect though personal in form; and that the opposite could only find acceptance where the action is held to be personal only, and the bond a mere bail bond.

The opposite position has been as firmly maintained. After the dissolution of the attachment by the substitution of a valid bond to pay whatever judgment may be rendered against the defendant, it has been held that no proceeding can follow in the case to test the validity of the attachment.[2] The case is very different from that of the delivery of the attached property to the defendant under a forthcoming bond, since, in the latter case, the attachment remains intact, the defendant holds under the sheriff, and the attached property is still constructively in court, and there may be a proceeding to test the validity of the attachment; and, if the attachment is found invalid, the forthcoming bond falls with it.

The defendant, (and usually his surety,) is understood to concede by bonding, beyond his power of denial in defending a suit upon the bond, that the property released belonged to himself, and was actually attached, (whether legally or not,) and was not exempt from execution and therefore from attachment.[3] Such

[1] Bates *v.* Killian, 17 S. C. 553.

[2] Kennedy *v.* Morrison, 31 Tex. 207; Huff *v.* Hutchinson, 14 How. 586; Barry *v.* Foyles, 1 Pet. 311; Hazelrigg *v.* Donaldson, 2 Met. (Ky.) 445; Dierolf *v.* Winterfield, 24 Wis. 143; Endress *v.* Ent, 18 Kan. 236; Wharton *v.* Conger, 9 Smedes & M. (Miss.) 510; Inman *v.* Stratton, 4 Bush, 445; Payne *v.* Snell, 3 Mo. 409; Childress *v.* Fowler, 9 Ark. 159; Gillispie *v* Clark, 1 Tenn. 2; Harper *v.* Bell, 2 Bibb. 221; Fife *v.* Clark, 3 McCord, 347; Reynolds *v.* Jordan, 19 Ga. 436; Scanlon *v.* O'Brien, 21 Minn. 434.

[3] Stephens *v.* Greene County Iron Co. 11 Heisk. 71; Frost *v.* White, 14 La. Ann. 140; Beal *v.* Alexander, 1 Rob. (La.) 277; McMillan *v.* Dana, 18 Cal. 339; Kennedy *v.* Morrison, 31

concession however cannot be predicated of the obligors of a dissolution bond, executed by virtue of law or the consent of the plaintiff, when the defendant himself has not signed it or is not the principal; at least, it has been so held in Louisiana.[1] Bonds to release attached property, given by others than the defendants in the suits, are allowed under the practice of some of the States. Claimants, intervening in such suits, may execute bonds in their own behalf; representatives of absent defendants may sign as principals, etc., under statute provisions. In an attachment suit against husband and wife, she bonded; and the judgment being rendered against him only, her sureties were not bound.[2]

Sec. 5. Dissolution by Final Judgment for Defendant.

Final judgment for the defendant, in the personal action, dissolves the attachment, as a matter of course, though he may have previously failed in all his efforts to have it dissolved for causes appertaining to the ancillary proceeding. Such judgment enables him to prosecute his action for whatever injury he may have received by the abuse of the process, as well as one expressly dissolving the attachment in the course of the suit. It is manifestly unnecessary to dwell upon this; but it seemed proper to mention it before proceeding to discuss the subject of damages for the plaintiff's abuse of the statutory remedy by attachment.

The judgment-defendant is entitled to the release of his property immediately, unless there has been an appeal granted or writ of error sued out operating as a *supersedeas*. Judgment of restoration is entered in proceedings *in rem* of general character, when the libellant is defeated in his attempt to get a judgment of condemnation; and, in such proceedings of a

Tex. 207; Coleman *v.* Bean, 32 How. (N. Y.) Pr. 370; Reynolds *v.* Jordan, 19 Ga. 436; Taylor *v.* Taylor, 3 Bush. (Ky.) 118; Hazelrigg *v.* Donaldson, 2 Met. (Ky.) 445.

[1] Edwards *v.* Prather, 22 La. Ann. 334; Baur *v.* Antoine, 22 Id. 145; Quine *v.* Mayes, 2 Rob. (La.) 510; Oliver *v.* Gwin, 17 La. 28; Kendall *v.* Brown, 7 La. Ann. 668; Schlater *v.* Broaddus, 14 Id. 82

[2] Jaycox *v.* Chapman, 10 Ben. 517

limited character, such as an attachment suit is, restoration is sometimes expressly decreed, though the usual entry is judgment for defendant, leaving the restoration a matter of implication. There is really no necessity that it should be expressed, since the personal judgment for the defendant is a dissolution of the attachment.[1] The attachment of land is held to be dissolved by the death of the defendant.[2]

Judgment of restoration to a claimant does not affirm his title against any person afterwards suing for it, even though the question, in the case in which the judgment was rendered, turned upon that of the claimant's ownership.[3]

[1] Higgins *v.* Grace, 59 Md. 365.
[2] Lipscomb *v.* McClellan, 72 Ala. 151.
[3] Cushing *v.* Laird, 15 Blatchford, 219.

CHAPTER XIV.

DAMAGES UPON DISSOLUTION.

§ 1. Reconvention.
2. Suit after Dissolution.
3. The Bond Obligation.
§ 4. Recovery of Costs and Fees.
5. Exemplary Damages.

Sec. 1. Reconvention.

To employ the extraordinary remedy of attachment when the ordinary is adequate; to create a lien upon the property of a debtor to secure an unprivileged debt, by means of a false affidavit; to seize and detain unincumbered property or credits of the debtor, prior to judgment, for the purpose of execution, when the plaintiff is not entitled to judgment, is an abuse of the statutory relief which the law affords to the honest creditor. If, by such abuse, the defendant is injured, he may recover damages. As a general rule, his right of action for damages does not arise until there has been dissolution of attachment upon the plaintiff's failure to maintain it by judgment; but there are different provisions in different States, and, in some, the defendant may recoup or reconvene for damages in the attachment suit itself. First, then, reconvention will be here considered.

Reconvention is of the nature of a cross-bill; it is pleaded by the defendant in his answer to the attachment suit, in which the defendant assumes the position of plaintiff in reconvention and alleges whatever damages he has suffered, their character and amount, and prays for judgment against the attaching creditor. To such cross action, the original plaintiff may plead any appropriate defense, unless issue is, under the practice of the State, deemed to be joined by the filing of the petition for attachment. The *onus* is none the less upon the attaching

creditor, to make good the allegations of his petition by reason of the reconvenor's averments that the attachment was wrongfully sued out or wrongfully executed, since they are at issue by the answer; but the burden is on him who claims damages to prove that he has suffered injury by reason of the wrongful attachment. His allegations of injury are proper matters for the attaching creditor to answer by way of joining issue on the reconventional demand.

Although the injury is dependent upon the decision in the attachment case, and cannot be known to exist till that has been rendered, yet business is expedited and justice more readily administered by trying both issues together, so that the court, when vacating the attachment, may award damages to the reconvenor at the same time. This is very common practice in Texas, and more or less so in Iowa, Nebraska, Minnesota, Maryland and other States.[1] The whole controversy between the parties is adjudicated as one cause; the attachment is tried, and evidence adduced, and arguments heard, both with reference to the claim for debt and the counter-claim for damages for the alleged wrongful proceeding. Much time and labor is thus saved; for the testimony which the defendant offers to defeat the attachment is usually what he would offer to sustain a separate suit for damages for wrongful attachment.

Réconvention, under such circumstances, is anomalous; for the declaration on the attachment bond is thus made before any liability on it has been matured. If the evidence is such that wrongful attachment has been proved and resultant injury established, the jury gives verdict covering both issues, and the court gives the reconvenor judgment on the bond when he decrees the dissolution of the attachment, and judgment for the defendant in the action against him for debt.

By counter-claim, (as the reconventional demand is styled in Iowa,) both actual and exemplary damages may be passed upon on the trial of the attachment suit. The defendant who has

[1] Hardeman *v.* Morgan, 48 Tex. 103; Lowenstein *v.* Monroe, 55 Iowa, 82; Turner *v.* Lytle, 59 Md. 199; Raymond *v.* Green, 12 Neb. 215. See Boyer *v.* Clark, 3 Neb. 161; Stevens *v.* Able, 15 Kan. 584; Read *v.* Jeffries, 16 Kan. 534; Wagner *v.* Stocking, 22 Ohio St. 297.

averred that the proceeding against him is both wrongful and malicious, and has prayed for damages in a round sum, may be required by motion to specify what he demands as actual and what for exemplary damages, and both claims go together to the jury.[1] If thus required by motion, it is not obligatory upon the defendant to confine himself to two allegations, one for actual and the other for exemplary damages, but he may itemize his demand under several heads, some tending to recovery for compensatory loss; and others for vexatious and malicious prosecution.[2] Losses and expenses incurred in defending against the attachment proceeding, those sustained by being deprived of the use of property attached, by injury thereto, and depreciation of its value, give rise to compensatory damages when the attaching creditor was actuated by good motives, but to exemplary damages or smart money, when his motives were malicious.[3] Therefore, when the proceeding is vexatious, injurious and without probable cause from its incipiency, there is no occasion for the counter-claimant to specify certain items of his claim as entitling him to one species of redress and others as grounds for a different kind; but such discrimination may be of utility when an attachment justifiably sued out has been maliciously prosecuted by some particular act. When required by motion to distinguish between what is claimed as actual and what for exemplary damages, the defendant need only specify the two sums.

In resisting a counter claim, the attaching creditor, it has been held, need not establish that he had such grounds of belief in his right to attach as would reasonably actuate a prudent man in matters of the highest moment to himself, since he would not act upon belief if there was a possibility of its being erroneous, nor be so likely to discover doubts in matters of ordinary importance as in those of the highest interest involving his life or fortune. In matters of the highest moment to himself, he exercises the greatest degree of care and caution. The law does not require the exercise of this degree

[1] Dent *v.* Smith, *et al.* 53 Iowa, 262.

[2] Lowenstein *v.* Monroe, 55 Iowa, 82.

[3] Campbell *v.* Chamberlain, 10 Iowa, 337.

of prudence in the formation of a belief as to the existence of facts which are grounds for issuing an attachment. It is sufficient if the attaching creditor shows that he had reasonable grounds to believe the allegations of his petition.[1]

The reconvenor or counter-claimant has the burden of proof just as though the attachment suit had been terminated and he were suing for damages in a separate action. His burden is lessened by what the attaching creditor is bound to prove as to the fact of attaching and by the record which is already before the court; but so far as establishing injury by reason of the abuse of the process and the amount of the injury, and the malicious motives of the creditor, the *onus* is wholly on the reconvenor, just as though he had brought a separate action to recover damages.

The defendant can recover on the bond, by way of reconvention, only of the principal obligor, since the surety is not a party to the attachment suit, and therefore cannot be made one to the cross action. This is the rule in Iowa;[2] and it will hold good everywhere unless there is statutory provision to the contrary, so that the surety creates his obligation with a view to such provision or is legally presumed to do so. If judgment is thus obtained against the principal alone, the surety ought to have his day in court in a separate action before he can be held, unless he has waived it by the terms of the bond or in some other way. His right of defense is as sacred as that of the principal. He ought not, by reason of the practice of reconvention, be placed in a worse position than he would be in a bond suit brought against both obligors after the judgment vacating the attachment.

Where the right of reconvening for damages in the attachment suit itself is authorized, it is necessarily limited by the jurisdiction of the court where that suit is brought or is pending when the defendant makes his cross demand.[3] If the court is only competent to try causes in which the demand does not

[1] Carey *v.* Gunnison, 51 Iowa, 202; Vorse *v.* Phillips, 37 Id. 428.

[2] Bunt *v.* Rheum, 52 Iowa, 619.

[3] Hardeman *v.* Morgan, 48 Tex. 103.

exceed a prescribed sum—say one thousand dollars, and an attachment suit is brought for that amount, and the bond is twice as much under statutory requirement, the defendant, though possibly damaged to the full extent of the bond, cannot reconvene for more than a thousand dollars. To get all his due, he must sue by a separate action in a different court.

Reconvention for damages sustained by a wrongful attachment in a former suit, cannot be made in an action for goods sold; it was held that such damages cannot be set up as a counter claim in such action.[1]

Sec. 2. Suit after Dissolution.

Reconvention for damages while the attachment suit remains pending, is exceptional: the general practice is that the action for wrongful and that for malicious attachment do not lie till the attachment suit is at an end. It must have been abandoned, set aside, settled or decided in favor of the defendant before he can sue for damages by reason of its institution and prosecution.[2] Prior to this, a suit for damages would be premature. It would be so, though the defendant has gained the attachment suit, if an appeal by the plaintiff is pending. Where, however, suit upon the bond for damages was brought while an appeal from the judgment dissolving the attachment was pending, to which suit prematurity was pleaded, the plaintiff was allowed to amend his petition and aver that the appeal had been decided in the Supreme Court adversely to the appellant; and the amendment was sustained and judgment on the bond for actual damages awarded and confirmed.[3] Had the appeal been still pending, or had a motion for a new trial, arrest of judgment, or any thing affecting the finality of the dissolution of attachment, still remained undecided, prematurity could

[1] Schmidt *v.* Bickenbach, 29 Minn. 122.

[2] Carver *v.* Shelley, 17 Kan. 472; Atkins *v.* Swope, 38 Ark. 528; Nolle *v.* Thompson, 3 Met. (Ky.) 121; Smith *v.* Story, 4 Humph. 169; Spaulding *v.* Wallett, 10 La. Ann. 105; Moore *v.* Willenberg, 13 La. Ann. 22; Accessory Co. *v.* McCerran, Id. 214; Harger *v.* Spofford, 46 Iowa, 11; Kinsey *v.* Wallace, 36 Cal. 462.

[3] McDaniel *v.* Gardner, 34 La. Ann. 341; Dickinson *v.* Maynard, 20 La. Ann. 66.

have been properly pleaded; it is necessary that the attachment be first vacated.[1]

Abandonment by the attaching creditor is vacation of attachment.[2]

Prematurity cannot be pleaded by the attaching creditor, when sued on the bond, if he has merely been non-suited, or put out of court by an exception or demurrer, with right to sue again.[3] Any such disposition of an attachment, if not appealed, is a final vacation of the attachment proceeding in which the bond was given; and right of action on the bond immediately arises, if any injury has been suffered by the attachment defendant. The renewal of the suit gives rise to an entirely new attachment with a new bond.

If, after an invalid attachment has been vacated, the creditor sue out a valid attachment against the same property in a suit against the same defendant, and the case be prosecuted to judgment, and the property be sold and its proceeds go to pay the defendant's debt, the latter fact will mitigate damages for the first and wrongful attachment.[4] Little more than nominal damages should be awarded. The defendant should have recompense for his outlay in defending the first suit, but nothing more. There may be cases, however, in which he would be entitled to much more. The mere dismissal of a suit is not always conclusive, in a suit for damages, that the attachment was wrongfully sued out.[5] And judgment for the attaching creditor is not always a bar to a damage suit on the bond.[6]

Several persons, who have suffered joint injury by attachment, may sue jointly.[7] They are not obliged to have uninjured co-obligees of the attachment bond united with them as

[1] State *v.* Williams, 48 Mo. 210; Pixley *v.* Reed, 26 Minn. 80; Sloan *v.* McCracken, 7 B. J. Lee, 626.

[2] Erwin *v.* Com. & R. R. Bank, 12 Rob. (La.) 227.

[3] McDaniel *v.* Gardner, 34 La. Ann. 341; Cox *v.* Robinson, 2 Rob. (La.) 313. See Sharpe *v.* Hunter, 16 Ala. 765.

[4] Morrison *v.* Crawford, 7 Or. 472; Earl *v.* Spooner, 3 Denio, 246.

[5] Nockles *v.* Eggspieler, 47 Iowa, 400; Cooper *v.* Hill, 3 Bush, 219; Pettit *v.* Mercer, 8 B. Mon. 51; Eaton *v.* Bartscherer, 5 Neb. 469; Smith *v.* Story, 4 Humph. 169.

[6] Bliss *v.* Heasty, 61 Ill. 338.

[7] Cochrane *v.* Quackenbush, 29 Minn. 376; Boyd *v.* Martin, 10 Ala. 700.

plaintiffs.[1] If the attachment has been sustained, so far as some of the obligees are concerned, the others are not therefore precluded from suing on the bond for their own injuries when the attachment has been vacated as to themselves.[2]

The general practice does not require that, prior to a suit on the bond against all the obligors, there first must be judgment obtained against the principal in a separate action.[3]

Sec. 3. The Bond Obligation.

The protection of the defendant against *the wrongful suing out of the writ* is what the bond is for. The creditor makes his own preliminary showing by affidavit, without cross-examination, to bring himself within the statutory authorization for the issuance of the extraordinary process. If he swears truly, there is such a debt and there are such existing grounds as will not only warrant the clerk to issue the unusual process but will render it his duty to do so. But what if the affidavit is false? What if the debt is either non-existent or not such as the legislator contemplated when authorizing attachment for a designated character of obligation? What if the defendant is not a non-resident, not an absconder, not a concealer or fraudulent disposer of property, though alleged in the affidavit to be one of these?

If, considering the liability of many to err wilfully in their own supposed interest, and the liability of all to err witlessly, all persons had the same open field to the extraordinary that they have to the ordinary process, the former would be much more frequently employed than it is at present, and defendants often would be harassed and injured without any ready remedy for redress and commonly without any adequate redress at all. The requirement of the bond tends to make creditors cautious

[1] Alexander *v.* Jacoby, 23 Ohio St. 358.

[2] *Id.*

[3] Bruce *v.* Coleman, 1 Handy, 515; Churchill *v.* Abraham, 22 Ill. 455; Jennings *v.* Joiner, 1 Coldwell, 695; Dickinson *v.* McGraw, 4 Randolph, 158; Herdon *v.* Forney, 4 Ala. 243. *Contra:* Sledge *v.* Lee, 19 Ga. 411; Sterling City Mining Co. *v.* Cock, 2 Col. 24; Holcomb *v.* Foxworth, 34 Miss. 265.

in their affidavits to procure the writ; lessens the number of wrongful attachment suits, and gives the defendant protection.

It is a general though not a universal statutory rule that the clerk shall not issue the writ, notwithstanding the affidavit that the debt and the grounds are such as to render the attachment process permissible under the law, unless the creditor has given a bond, with surety, conditioned that he will "pay the defendant all such damages as he may sustain *from the wrongful suing out of the writ;*" or, "all damages which he may sustain, *if the order is wrongfully obtained;*" or, "all damages that he may sustain and all costs that may be incurred by him *in consequence of suing out the attachment;*" or, "all damages that may be sustained by reason of the attachment," etc.[1]

Wherever the bond is thus made a pre-requisite to the issuance of the writ, the clerk would be liable in damages if he should act without it; the plaintiff would also be thus liable; and the process itself, were it sufficient to protect the sheriff for attaching under it, would be otherwise void. It would not protect the sheriff in those States where the execution of the bond must be stated in the writ, if not so stated. The bond is as important as the affidavit when made a pre-requisite to the writ, and should appear of record.

The obligation to pay damages, assumed in the attachment bond, in case of the wrongful causing of the writ to be issued, or the wrongful procedure under the writ, has no reference to the personal action against the debtor considered apart from the proceeding against his property. The institution of an ordinary action against the debtor is the creditor's right, without affidavit and without bond. The institution of the extraordinary action is not his right, unless he bring himself within the statute, and take the required obligation; but if the defendant should suffer no wrong but what would have ensued from an ordinary suit legally brought but not sustained by evidence,

[1] Benedict *v.* Bray, 2 Cal. 251; Thompson *v.* Arthur, Dudley, (Ga.) 253; Cousins *v.* Brashier, 1 Blackf. 85; Starr *v.* Lyon, 5 Ct. 538; Ford *v.* Woodward, 10 Miss. 260; Stevenson *v.* Robbins, 5 Mo. 18; State Bank *v.* Hinton, 1 Dev. L. (N. C.) 397; Bank of Albany *v.* Fitzpatrick, 4 Humph. 311; Briggs *v.* Smith, 13 Tex. 269.

would the plaintiff be liable upon the bond? Take this case: Affidavit and bond being executed, and attachment issued, no property is seized and taken from the defendant—the attachment is in the hands of a third person, by garnishment, according to the sheriff's return; but the garnishee denies that he is a creditor of the defendant or the holder of any property of his, and is discharged. The personal action goes on and results in a judgment for the defendant. Whether the defendant can recover or not, depends upon the injury he may have sustained by the charges. He may have been seriously slandered by a charge of absconding, for instance. If only alleged to be a non-resident; or, if it be conceded that he was no more damaged by reason of the attachment than he would have been had an ordinary suit been unsuccessfully brought against him, it would seem that the conditional obligation of the bond would not have been incurred.

Take the case of land attached when the owner is not dispossessed; of personal property only nominally attached, as is sometimes improperly done; of property attached which proves not to be that of the defendant: it seems clear in such cases that no obligation is incurred to the defendant for injury done to property.[1] And the costs of defending the personal action, and the attorney's fees, ought not to be included in damages for wrongfully suing out an attachment ancillary to the main suit, if they can be shown to be not consequent from the issue of the writ.[2]

When the obligation is to pay such damages as the defendant may recover should it be decided *that the attachment* was wrongfully obtained, the subsequent acts of the plaintiff during

[1] Phillips *v.* Bridge, 11 Mass. 242, 248; Watts *v.* Shropshire, 12 La. Ann. 797; Heath *v.* Lent, 1 Cal. 410; Bridge *v.* Wyman, 14 Mass. 190, 195; Groat *v.* Gillispie, 25 Wend. 383; Moresi *v.* Swift, 15 Nev. 215; Pinson *v.* Kirsh, 46 Tex. 26.

[2] Andrews *v.* Glenville Woolen Co. 50 N. Y. 282; White *v.* Wyley, 17 Ala. 167; Boatwright *v.* Stewart, 37 Ark. 614; Hughes *v.* Brooks, 36 Tex. 379; Dunning *v.* Humphreys, 24 Wend. 31; Alexander *v.* Jacoby, 23 Ohio St. 358; Pettit *v.* Owen, 8 B. Mon. 51; Burgen *v.* Shaver, 14 Id. 500; Johnson *v.* Farmers' Bank, 4 Bush, 283; Trapnall *v.* McAfee, 3 Met. Ky. 34; Hayden *v.* Sample, 10 Mo. 215.

the prosecution of the suit, causing injury and loss, give rise to recoverable damages upon the dissolution of the attachment. It would be the same if the bond were written in the usual words, "if the writ is wrongfully sued out" or the like. Upon dissolution, it legally appears that the attachment was wrongful, and subsequent acts are resultant. The obligation certainly includes the reparation of loss in property caused by its seizure and detention; its depreciation, deterioration or destruction. Being injuries to the defendant directly traceable to the issuing of the writ, though occurring later in the proceedings, they are covered by the obligation assumed by the plaintiff when giving the bond.[1]

Whether loss of time and business may be computed in reckoning the damages incurred by a wrongful attachment, depends upon the question whether such injury is direct or remote. A merchant would be seriously injured by the seizure of his stock and the closing of his store for weeks or months, though the goods themselves should not be damaged or deteriorated in value by a depreciation of the price while in the custody of the officer. In such case it seems indisputable that damages would be recoverable under an attachment bond as ordinarily written; but merely speculative allegations of the loss of profits from such cause are not permissible assignments of the breach of such bond; they are deemed too uncertain and remote.[2]

The plaintiff obligates himself to pay, not simply in case damages result because of his false affidavit as to the debt but

[1] Boatwright *v.* Stewart, 37 Ark. 614; Patton *v.* Garrett, Id. 605; Dent *v.* Smith, 53 Iowa, 262; Frankel *v.* Stern, 44 Cal. 168; Leah *v.* Greenwood, 21 Ala. 491; Fleming *v.* Bailey, 44 Miss. 132; Foster *v.* Sweeney, 14 Serg. & R. 387; Wallace *v.* Finberg, 46 Tex. 35; Churchill *v.* Abraham, 22 Ill. 455; Carpenter *v.* Stevenson, 6 Bush, 259; Veiths *v.* Hagge, 8 Iowa, 163; Reidhar *v.* Berger, 8 B. Mon. 100; Petit *v.* Mercer, Id. 51; Dunning *v.* Humphrey, 24 Wend. 31; Ranlett *v.* Constance, 15 La. Ann. 423; Cox *v.* Robinson, 2 Rob. (La.) 313; Offutt *v.* Edwards, 9 Id. 90; Horn *v.* Bayard, 11 Id. 259; McReady *v.* Rogers, 1 Neb. 124; Williams *v.* Hunter, 3 Hawks. (N. C.) 545; Campbell *v.* Chamberlain, 10 Iowa, 337; Abbott *v.* Whipple, 4 Greene, (Ia.) 320; Lawrence *v.* Hagerman, 56 Ill. 68; Clark *v.* Brott, 71 Mo. 473; Frank *v.* Chaffe, 34 La. Ann. 1203.

[2] Wilson *v.* Manufacturing Co. 88 N. C. 5; Marqueze *v.* Southeimer, 59 Minn. 430; State *v.* Thomas, 19 Mo. 613; Craddock *v.* Goodwin, 54 Tex.

also as to the grounds for the extraordinary remedy; and therefore, though the debt be due and owing as alleged, he is liable if the writ was wrongfully issued because of the false statement as to the defendant's non-residence, absconding, or fraudulent disposition of property.[1] His *animus* cannot be considered in his favor, when the the obligation is positive; he may have sworn in good faith yet been mistaken as to the circumstances, both with regard to the debt and the ground, or either, and yet render himself liable by his bond to damages.[2] But if swearing to his belief is all that is required for the issue of the writ, and the bond is to pay damages caused by a wrongful atttachment, he is not always held obligated by the bond because the facts proved to be different from what he honestly believed, if he had good reason to believe them.[3]

Sec. 4. Recovery of Costs and Fees.

The bond, as ordinarily written, binds the obligor to make good, not only the loss and injury done to property, but other pecuniary losses in the way of expenditure when they are traceable to the issuance of the writ, including costs of court.[4] Costs follow the judgment, and may be understood as included

578; Floyd *v.* Hamilton, 33 Ala. 235; Pollock *v.* Gantt, 69 Ala. 373; 44 Am. Rep. 519; Donnell *v.* Jones, 13 Ala. 490; Dall *v.* Cooper, 9 B. J. Lee, 574; Myers *v.* Farrell, 47 Miss. 281; Hallock *v.* Belcher, 42 Barb. 199; Campbell *v.* Chamberlain, 10 Iowa, 337; Lowenstein *v.* Monroe, 55 Iowa, 82.

[1] Foster *v.* Sweeny, 14 Serg. & R. 387; Sanders *v.* Hughes, 2 Brev. (S. C.) 495; Drummond *v.* Stuart, 8 Iowa, 341; Kirksey *v.* Jones, 7 Ala. 622; Watson *v.* Kennedy, 8 La. Ann. 280.

[2] Hayden *v.* Sample, 10 Mo 215; Churchill *v.* Abraham, 22 Ill. 455; Tucker *v.* Adams, 52 Ala. 254; Metcalf *v.* Young, 43 Id. 643; Lockhart *v.* Woods, 38 Id. 631; Alexander *v.* Hutchinson, 9 Id. 825; Gaddis *v.* Lord, 10 Iowa, 141; Mitchell *v.* Mattingly, 1 Met. (Ky.) 237. But in a suit for malicious attachment, the *animus* becomes important; intent to injure must be proved to recover exemplary damages: Nordhaus *v.* Peterson, 54 Iowa, 68.

[3] Burkhart *v.* Jennings, 2 W. Va. 242; Vorse *v.* Phillips, 37 Iowa, 428; Dent *v* Smith, 53 Iowa, 262; (See Burton *v.* Knapp, 14 Iowa, 196;) Winchester *v.* Cox, 4 G. Greene, 121; Stevenson *v.* Robbins, 5 Mo. 18. *Contra:* Alexander *v.* Hutchinson, 9 Ala. 825; Temple *v.* Cochran, 13 Mo. 116; Dider *v.* Courtney, 7 Id. 500; Chenault *v.* Chapron, 5 Id. 438.

[4] Lowenstein *v.* Monroe, 55 Iowa, 82; Dunning *v.* Humphrey, 24 Wend. 31; Schuyler *v.* Sylvester, 28 N. J. L. 487; Hayden *v.* Sample, 10 Mo.

in the hypothetical obligation assumed by the plaintiff in the bond.

Counsel fees for the defense of the attachment suit, and of injunction suits under similar conditions, have frequently been considered, in estimating damages, as embraced under the obligation of the bond.[1] If such fees are taxed with the costs, they are as clearly recoverable from the obligor as the bills of the clerk and sheriff. But neither the former nor the latter are taxable or recoverable when they are overcharged. It is only legal costs which the obligor is bound for. So far as court charges are concerned, they are usually embraced in the judgment, so that if the attachment is dissolved, they are collected of the plaintiff by the officers, and there is no contest to follow concerning them between the parties litigant. But if the defendant has paid them and afterwards seeks to recover them of the plaintiff, he can only recover legitimate costs. It does not matter that he has paid them and that he exhibits receipts therefor: he should have contested the illegal charges. It does not even matter if the illegal costs have been taxed by the court; for the taxing was a judgment to which the plaintiff was not a party. Were the plaintiff a party to it, the case would be different. So, of the taxing of counsel fees. The court ought to allow reasonable charges only; but where the law has provided a fee-tariff, and the court allows an excess, the defendant, if obliged to pay, cannot recover of the plaintiff

215; Kelly *v.* Beauchamp, 59 Id. 178; Winsor *v.* Orcutt, 11 Paige, 578; Hellman *v.* Fowler, 24 Ark. 235; Trapnall *v.* McAfee, 3 Met. (Ky.) 34; Nockles *v.* Eggspieler, 53 Iowa, 730; Bennett *v.* Brown, 20 N. Y. 99; Campbell *v.* Chamberlain, 10 Iowa, 337.

[1] Nockles *v.* Eggspieler, 53 Iowa, 730; Weller *v.* Hawes, 49 Iowa, 45; Hayden *v.* Sample, 10 Mo. 215; Raymond *v.* Green, 12 Neb. 215; (41 Am. Rep. 763;) Wilson *v.* Root, 43 Ind. 486; Littlejohn *v.* Wilcox, 2 La. Ann. 600; Jones *v.* Doles, 3 Id. 588; McRae *v.* Brown, 12 Id. 181; Phelps *v.* Coggeshall, 13 Id. 440; Transit Co. *v.* McRea, Id. 214; Burton *v.* Smith, 49 Ala. 293; Bolling *v.* Tate, 65 Id. 417; 39 Am. Rep. 5; Seay *v.* Greenwood, 21 Id. 491; Brown *v* Jones, 5 Nev. 374; Vorse *v.* Phillips, 37 Iowa, 428; Bank *v.* Heath, 45 N. H. 524; Morris *v.* Price, 2 Black, 457; Murray *v.* Munford, 2 Cow. 400; Shultz *v.* Morrison, 3 Met. (Ky.) 98; Boyd *v.* Brisban, 11 Wend. 229; Fitzpatrick *v.* Flagg, 12 Abb. Pr. 189; Corcoran *v.* Judson, 24 N. Y. 106.

on his bond, at the termination of the suit in the defendant's favor, any more than the legal fee, provided the plaintiff was not concluded by the allowance as a party to the rule.

Whatever is rightfully taxed as fees and costs may be recovered on the bond, if the defendant is responsible for them to his counsel or to the officers of court, whether he has already paid them or not.[1] If either counsel or officer has released him from the payment he cannot recover on the bond for the sum released. If he has already paid, that fact would not enable him to make the obligor of the bond refund to him an equal sum, if the payment was illegal or excessive. The payment should be considered as a circumstance in his favor, showing his good faith, and proving how much he has lost by the wrongful attachment; but he should have performed the very disagreeable duty of opposing the illegal bill before he paid it; and, if he has avoided such duty, he cannot recover of the plaintiff merely because he has paid it. The plaintiff would have the same right to contest it that the defendant previously had.

Are untaxed counsel fees recoverable on the bond? This has been a mooted question, and it requires notice more at length than most of the others arising in actions on such instrument. The obligation is to pay whatever damages the obligee may suffer by reason of the wrongful attachment. The obligee is driven to the defense of the suit and must have counsel and must pay for it and ought to be reimbursed for such forced outlay as for any other when the fee is reasonable and its payment obligatory. Such loss of money is a consequence of the wrongful attachment.[2] "The necessity of paying such counsel fees is an actual damage which the defendants have sustained. * * * * It is not a mere matter of discretion, as the condition of the bond is imperative, that the obligors in the bond shall pay * * * * such damages" as the obligees may sustain by reason of the injunction. The action which Chan-

[1] Jones *v.* Doles, 3 La. Ann. 588. In Patton *v.* Garrett, 37 Ark. 605, it was held that attorneys' fees are not actual damage and not recoverable.

[2] Hayden *v.* Sample, 10 Mo. 215.

cellor Walworth was considering when he made the above quoted remarks, was upon an injunction bond, but it involved the principle here under consideration.[1] He goes on to reason that under a covenant of warranty in a conveyance, the evicted grantee may recover of his grantor the necessary counsel fees which he has paid in defending the title as a part of the damages sustained by the breach of warranty, and that the right to recover such fees in the bond suit is the same in principle.

If there is perfect analogy between a suit on an attachment bond and one on an injunction bond, no conclusive argument can be based on such analogy to prove that counsel fees are allowable; for, though they have often been held so,[2] they have sometimes been held to the contrary.[3] And, with reference to the argument drawn from actions by a vendee on the breach of the covenant of warranty, it is not everywhere settled that the attorney fees not taxed, which the ejected grantee has been obliged to pay in defending the title, can be recovered as damages.[4]

[1] Edwards *v.* Bodine, 11 Paige, 223.

[2] Corcoran *v.* Judson, 24 N. Y. 106; Bank *v.* Heath, 45 N. H. 524; Brown *v.* Jones, 5 Nev. 374; Fitzpatrick *v.* Flagg, 12 Abb. Pr. 189; McRae *v.* Brown, 12 La. Ann. 181; Murray *v.* Munford, 2 Cow. 400; Boyd *v.* Brisban, 11 Wend. 229; Bolling *v.* Tate, 65 Ala. 417; 39 Am. Rep. 5; Holmes *v.* Weaver, 52 Ala. 516; Garrett *v.* Logan, 19 Id. 344; Miller *v.* Garrett, 35 Id. 96; Pounds *v.* Hamner, 57 Id. 342.

[3] Oliphant *v.* Mansfield, 36 Ark. 191; Oelrichs *v.* Spain, 15 Wall. 211; Ferguson *v.* Baker, 24 Ala. 402; Bullock *v.* Ferguson, 30 Id. 227.

[4] In Turner *v.* Miller, 42 Tex. 418; 19 Am. Rep. 47, this subject is learnedly discussed, and fees disallowed. In the opinion, and in a note appended by the reporter in the American Reports, the following cases are cited which favor the allowance: Rickert *v.* Snyder, 9 Wend. 422; Rowe *v.* Heath, 23 Tex. 620, on special promise by grantor; Staats *v.* Executors of Ten Eyck, 3 Caines, 115–117; Robertson *v.* Lemon, 2 Bush, 301; Dalton *v.* Bowker, 8 Nev. 190; Keeler *v.* Wood, 30 Vt. 242; Smith *v.* Sprague, 40 Id. 43. Reference is made in the note to McGary *v.* Hastings, 39 Cal. 360; 2 Am. Rep. 456; Levitzky *v.* Canning, 33 Cal. 299; Harding *v.* Larkin, 41 Ill. 413; Mayor *v.* Dunnavant, 25 Ill. 362; Hoot *v.* Spade, 20 Ind. 326; McAlpine *v.* Woodruff, 11 Ohio St. 120; and to the following to the *contra:* Hale *v.* The City of New Orleans, 13 La. Ann. 502; Sarpy *v.* New Orleans, 14 Id. 311; Williams *v.* Le Blanc, Id. 757; Yokum *v.* Thomas, 15 Iowa, 67; Clark *v.* Brott, 71 Mo. 473; Frank *v.* Chaffe, 34 La. Ann. 1203.

The injustice of not remunerating the grantee for whatever he is compelled to pay by reason of a breach of warranty on the part of the grantor, must be apparent to the candid mind; and what he is obliged to pay to his counsel ought not to constitute any exception. Ordinarily, the burden of the defense of an ejectment suit falls upon the grantor who is called in warranty, but the grantee is in court and has rights to be looked after, and his interests would be likely to suffer were they not protected by a competent representative.

If the analogy between such suits by grantees and suits on injunction bonds, on the one side, and those now under treatment, on the other, were perfectly established; if in all, counsel fees were admitted to be recoverable as damages, it would not follow that whatever fees have been paid or agreed upon by the defendant and his counsel, are recoverable from the obligor of the attachment bond. Indeed, in none of the classes of cases above noticed are unreasonable fees thus collectible. What is and what is not unreasonable is a matter for decision. A fee may seem large yet not be unreasonable. A fee may be what the defendant of the attachment suit was, by reason of the attachment, obliged to pay in order to get the best aid. He is entitled to the best. He ought to be reimbursed for what the ablest professional services rendered have reasonably cost him. But, however valuable the services, no damages can be recovered if they were gratuitously rendered.

Sec. 5. Exemplary Damages.

Attaching without probable cause is legally deemed malicious, and a common law action for damages will lie. Such action is not limited by the sum nominated in the attachment bond, but the injured defendant may claim, and the jury may award, such exemplary damages as may be proper to remunerate him for injury to himself and his property and punish the attaching creditor for his wanton abuse of the extraordinary remedy to which he has resorted for the recovery of his ordinary debt.

Although suits of this kind for malicious attachments are

not strictly within the purview of a treatise on the law of attachment, it may be well to notice them briefly in this connection.

Whether the damages to be awarded are actual or exemplary, depends upon the question of malice; and this is often referable to the circumstances of the case. If the attaching creditor acts under legal advice, that is often considered indicative of good intent limiting his liability to actual damages when the proceeding is found wrongful.[1] This circumstance in his favor is not always conclusive, however;[2] for all suits brought by attorneys may be presumed to be instituted under their advice, and it would not do to attribute good motives to plaintiffs by reason of that fact, if there are other circumstances tending to show a malicious spirit. Both client and counsel may be actuated by such spirit and both be amenable to exemplary damages.[3] The principal is not to be deemed to have been malicious because his agent or attorney is proved to have been so.[4]

The spirit by which the attaching creditor was actuated in suing out his writ may be inferred, in a great measure, from what is proved as to his honest belief of his right of action when he instituted it. If he had not only an honest but a reasonable opinion that, under the existing facts as he understood them, he was entitled to the relief which he sought, he cannot be held to have been actuated by malice, though the attachment itself may have been illegal, unjustifiable and injurious.[5]

The burden of proof is on him who claims exemplary damages to show that the attachment suit was instigated or insti-

[1] McDaniel *v.* Gardner, 34 La. Ann. 341; Dickinson *v.* Maynard, 20 La. Ann. 66; Teal *v.* Lyons, 30 La. Ann. Part I, 1140; Raver *v.* Webster, 3 Iowa, 502; Roach *v.* Brannon, 57 Miss. 490; Alexander *v.* Harrison, 38 Mo. 258.

[2] Ravenga *v.* Mackintosh, 2 Barn. & Cressw. 693.

[3] Wood *v.* Weir, 5 B. Mon. 544.

[4] Willis *v.* McNeill, 57 Tex. 465.

[5] Spengler *v.* Davy, 15 Gratt. 381; Barrett *v.* Spaids, 70 Ill. 408; Alexander *v.* Harrison, 38 Mo. 258; Williams *v.* Hunter, 3 Hawks, (N. C.) 545; Smith *v.* Story, 4 Hump. 169; Donnell *v.* Jones, 13 Ala. 490; White *v.* Wyley, 17 Id. 167; Wood *v.* Barker, 37 Id. 60; McCullough *v.* Grishhobber, 4 Watts & Serg. 201; Nordhaus *v.* Peterson Brothers, 54 Iowa, 68; Dent *v.* Smith, 53 Id. 262; Vorse *v.* Phillips, 37 Id. 428; Kenney *v.* Meacham, 18 Fed. R. 312.

tuted by the defendant, that it was without probable cause, that it has been terminated without judgment justifying the attachment, and that he has been injured:[1] thereupon, it devolves on the defendant to prove good motives by establishing facts tending to that end, if he would thus avoid the consequences of his wrongful attachment.[2]

In defending against a suit for exemplary or vindictive damages, the defendant may prove that there was debt due him, if that has not been decided adversely to him in the attachment suit—if he was merely non-suited therein; he may show anything which will establish a lawful *animus* on his part, since malice is necessary to his liability.[3] It has been held that to support an action for malicious prosecution, it must be shown not only that there was no cause of action but that the prosecutor knew it and acted maliciously;[4] and such showing may be met by counter evidence showing good intent, advice of counsel, etc.[5]

"The malice necessary to be shown * * * is not necessarily revenge or other base and malignant passion. Whatever is done wilfully and purposely, if it be at the same time wrong and unlawful, and that known to the party, is in legal contemplation malicious. That which is done contrary to one's own conviction of duty, or with a wilful disregard of the rights of others, whether it be to compass some unlawful end, or some lawful end by unlawful means, or * * * * to do a wrong

[1] Wood *v.* Weir, 5 B. Mon. 544; Pixley *v.* Reed, 26 Minn. 80; Sloan *v.* McCracken, 7 B. J. Lea, 626; Bump *v.* Betts, 19 Wend. 421; Dent *v.* Smith, 53 Iowa, 150; Feazle *v.* Simpson, 2 Ill. 30; Walser *v.* Thies, 56 Mo. 89; O'Grady *v.* Julian, 34 Ala. 88; Lawrence *v.* Hagerman, 56 Ill. 68; Ives *v.* Bartholomew, 9 Ct. 309; Tomlinson *v.* Warner, 9 Ohio, 103; Williams *v.* Hunter, 3 Hawks, 545; Sledge *v.* McLaren, 29 Ga. 64; Wiley *v.* Tranwick, 14 Tex. 662.

[2] Carey *v.* Gunnison, 51 Iowa, 202; Kirksey *v.* Jones, 7 Ala. 622; Donnell *v.* Jones, 13 Id. 490; White *v.* Wyley, 17 Id. 167; Wood *v.* Barker, 37 Id. 60; Lockhart *v.* Woods, 38 Id. 631; Spengler *v.* Davy, 70 Ill. 408; Melton *v.* Troutman, 15 Ala. 535; Morrison *v.* Crawford, 7 Oregon, 472.

[3] Lindsay *v.* Larned, 17 Mass. *190, *197; Bond *v.* Ward, 7 Id. *130.

[4] Stone *v.* Swift, 4 Pick. 393.

[5] Id.

and unlawful act knowing it to be such, constitutes legal malice."[1]

Malice is not necessarily inferable from want of probable cause.[2]

Neither party can reopen what was *settled* by the attachment suit. The judgment therein is *res judicata* as to them when the proceedings were *inter partes*. The truth of the attaching creditor's affidavit cannot be questioned after it has been traversed and sustained. The final judgment is conclusive between the parties as to whether the attachment was rightfully or wrongfully sued out; and therefore it cannot be collaterally assailed by either the plaintiff or the defendant in the subsequent damage suit. If held rightfully sued out and prosecuted, it is a bar to any action for exemplary damages; but if there has been judgment for the attachment-debtor, that merely establishes that the attachment was wrongful; it leaves open the question whether it was malicious, and therefore suit will lie for exemplary damages.

Judgment against the attaching creditor, if accompanied by a judicial entry, made contradictorily between the parties, decreeing that there was probable cause for the creditor's suing out the attachment, will operate as a perfect bar to a subsequent action for exemplary damages, wherever such practice authorizedly prevails.

Non-suit, discontinuance, settlement by compromise, or any disposition of the attachment suit not expressly or impliedly by contract precluding the alleged debtor from his action for damages, constitutes no bar; nothing is thus finally adjudicated; and therefore there is nothing to be urged, by reason of any such disposal of the cause, as a reason why an injured debtor should not be heard.

It must be noted that only what is adjudicated finally between the parties is a bar to the action for exemplary damages: hence, even a judgment in favor of the attaching

[1] Wills *v.* Noyes, 12 Pick. 324, 328, citing U. S. *v.* Ruggles, 5 Mason, 192; Looker *v.* Halcomb, 4 Bingh. 190; Harman *v.* Tappenden, 1 East, 567, note.

[2] Willis *v.* McNeill, 57 Tex. 465.

creditor would be no bar to an action against him for libel committed by written and published charges against the debtor's character and reputation, when such charges are wanton, unnecessary, and no basis upon which the judgment sustaining the attachment is rendered; when the court, in giving reasons for judgment, repudiates such charges as unproved, and places the decree upon other grounds. For instance, if the attaching creditor should charge that his alleged debtor is guilty of not only legal but moral fraud, and fail to sustain that allegation, but should gain his cause simply on the facts of indebtedness and the non-residence of the debtor, the judgment would be no bar to a subsequent suit against him for exemplary damage for such wanton, false, slanderous, malicious and wholly unnecessary assault upon character.

When not *inter partes*, the judgment in the attachment suit may be collaterally attacked by the owner of the condemned *res*, except with reference to the *res* itself. As, in such suit, there can be no personal judgment against the merely nominal defendant, he is not estopped from investigating charges made against himself when they were void of bearing against the property attached. If, being notified by publication, he failed to respond, and his attached property was condemned to pay his debt, upon proof of the indebtedness and of his fraudulent disposition of property, his absconding to avoid creditors or the like, he cannot collaterally attack the judgment; for a decree *in rem* is *res judicata* as to him; and it would be so against all the world in a proceeding to fix the *status* of forfeited property in which all are notified. But the attachment-debtor is not "in court by his property," and therefore the judgment is a nullity so far as it goes beyond the *res* of the action, and all the excess may be collaterally attacked.

When the judgment is against both the debtor and his attached property; that is, when both are in court and the decree is against him with privilege upon the thing attached, and when the creditor's allegations and prosecution of his cause have been sustained by the court, the decree is *res judicata*, and a complete bar to any subsequent action either for actual or exemplary damages.

CHAPTER XV.

JUDGMENT SUSTAINING ATTACHMENT AND PERFECTING THE LIEN.

§ 1. Default after Service.
2. Decree *nisi*.
3. Default after Seizure and Publication.
4. Trial upon Issue Joined.
5. Intervention.
6. Junior Attachers.
7. Claimants.
8. Priority of Seizure.
9. Priority of Garnishment.
10. Simultaneous Seizures.
11. Competition with Mortgage Liens.
§ 12. Sale by the Debtor before Seizure.
13. Assignment.
14. Final Decree, with Privilege.
15. Final Decree against the Garnishee.
16. Garnishee Protected by Judgment.
17. Execution.
18. Garnishment in Execution.
19. Concursus.

Sec. 1. Default after Service.

After service, or after the entry of appearance, the defendant may be defaulted if he does not plead within the given time. This is not different in attachment suits from what it is in ordinary actions so far as the personal cause is concerned. The court's jurisdiction over the defendant is complete when he has been served, or when he has appeared whether served or not. And the conjunction of seizure and service, (or seizure and appearance without service,) gives perfect jurisdiction over the ancillary suit. The property, in that subordinate proceeding, can answer only by its owner; and there may be default when he does not answer within the legal delay. Both the principal and ancillary suits being in the same proceeding, one answer will suffice to prevent judgment by default in both. When they are separate, the defendant of the main suit should plead in both; but should he successfully defend in the personal suit, the other would fall to the ground with it whether there was

any denial of the alleged grounds for attachment or not; it would so fall in consequence of its ancillary character—there being no valid judgment against the property to perfect a lien in security of a debt if there is no debt.

Judgment by default should not be entered, notwithstanding service may have been made, if the plaintiff has filed no petition or complaint beyond the affidavit.[1] In such case, there is nothing to be answered.

The confirmation of default, after the legal delay, by due proof of the allegations of the petition, is a final judgment in cases where the duly summoned defendant has failed to appear, so far as the court trying the cause is concerned. If never appealed, or if affirmed on appeal, such judgment is in all respects as good and as conclusive as if rendered after issue joined. It is true that the defendant may set aside the default after such confirmation, upon proper showing, within such period, and under such circumstances as the statute of his State may have provided for such case; but he has no "year and a day" within which to appear and bond and try the cause over again. He has been served, or has entered appearance; and he cannot complain of his own laches and even contumacy in failing to plead. He had his "day in court" in the opportunity afforded, and he has no one but himself to blame for not embracing that opportunity. He must put himself *rectus in curia* by making the proper showing, purging himself of contumacy, and filing his answer under leave, in order to have the cause re-opened so that he may exercise all the rights and privileges of a litigant.

The privilege of appearing within "a year and a day" after default, (as in the next section, and elswhere shown,) is when the proceeding is as under the custom of London, and under the practice of States following that custom; but it is not accorded under the prevalent practice in this country.

Sec. 2. Decree nisi.

When the summons has been returned unserved, and property is afterwards attached in the hands of third persons, or otherwise,

[1] Jones *v.* Howard, 42 Ala. 483; Penn *v.* Edwards, Id. 655; Woolkins *v.* Haid, 49 Mich. 299: all precedent conditions must be observed.

and no notice by publication is made and no appearance is entered, a judgment by default is not immediately allowable: not till notice. Who is in default? If neither cited or notified, the debtor is not in default for non-appearance. He cannot be in contumacy for not obeying a summons never served; not heeding an invitation never extended.

The custom of London allows judgment by default after verbal proclamation repeated on successive court days; the defendant, not responding to the oral call, may be defaulted. But that custom never allowed final judgment under such circumstances. The case was open for a year and a day within which the defendant might appear, enter bail and plead. The creditor could not obtain attached property from the court for sale without giving security to protect the owning absentee, or presenting pledges to restore. Pledgors entered into recognizance to pay the owner so as to make good his wrongs in case the judgment should be set aside. And such of our own States as allow like default and sale without service or notification, still require that the plaintiff should give security so as to protect the defendant should he appear within a year. At the expiration of the time, the judgment is deemed final. Such practice, though seemingly amounting to the taking of one's property without due course of law, was in full exercise when the constitution of the United States was adopted. It may be plausibly and perhaps satisfactorily argued that the framers of that instrument did not design to inhibit such procedure. That was one of the ways in which law was then administered in courts of justice; and, ever since, it has been thus administered in some of the States in cases of foreign attachment; and, in one or two, even in domestic attachment.

In Pennsylvania, attached property of a debtor, who absconds or conceals himself to defraud creditors, is delivered to three trustees, appointed by the court, who notify, by publication, all debtors of the defendant and all holders of his property to pay or deliver to them; and all his creditors to present their claims. These trustees are really judicial assignees; the estate of the attachment-defendant legally rests in them for the purpose of administration; they sue, in behalf of the estate and for the

use of the creditors in their own names; they summon and examine persons supposed to be indebted to the defendant; they issue warrants for the seizure of goods and chattels, books, papers, etc., and may cause stores, warehouses, boxes, etc., to be broken open when that is necessary to the execution of a warrant. They take charge of the real property of the debtor when vested in them in like manner; sell and dispose of it as administrators; redeem mortgaged property when necessary; and finally adjust the several claims of the creditors after having accorded a hearing to those who have appeared, and then file their report in the office of the prothonotary. Exceptions to the report may be filed, for the consideration of the court. If none are filed, the trustees distribute the fund derived from the estate of the debtor among those who have established their claims by proof, without preference. There is preference given to the first attacher when the process is under the statutes governing foreign attachment, which is quite different, in this State, from domestic. The method above described is not exclusive.

In Delaware, domestic attachment has many of the features which distinguish it in Pennsylvania. There are three auditors who exercise functions similar to those of the trustees above mentioned; such as notifying creditors, auditing claims; distributing the proceeds of the attached property, etc. They are not, however, administrators of the estate of the defendant, in any sense; their powers are more limited than those of the trustees in Pennsylvania. In the distribution of the proceeds, they award a double portion to the attaching creditor who has prosecuted his suit to judgment, if such portion does not exceed his adjudged claim; but he is not necessarily paid in full as a lien-holder by reason of his attachment. Delaware, like Pennsylvania and some other States, distinguishes between domestic and foreign attachment; but in both, the absent debtor is secured in case he appear and set aside the judgment and disprove the debt within a year. In domestic attachments, the creditors receiving proceeds from the auditors, must enter into recognizance, with surety, to secure the protection of the debtor by the refunding of the sum received in case he should appear and disprove the indebtedness within that time; and, in case of

foreign attachment, the plaintiff must enter into like recognizance.

In New Jersey, the proceeding is similar to that of the two States above mentioned. The court appoints an auditor to examine all claims, adjust and report upon them. His powers much resemble those of the trustees appointed in Pennsylvania. The auditors issue citations, warrants, etc.; examine witnesses and interrogate persons supposed to be cognizant of the affairs of the defendant; investigate supposed fraudulent transactions; cause the seizure of unsurrendered property, and effect it by breaking into stores, warehouses, boxes, etc., when necessary; bring suits, under certain restrictions; sell the property of the defendant, including land; and distribute the proceeds among the creditors in dividends proportionate to their established demands. The judgment does not preclude the absent defendant from coming within a year and suing those who have received dividends, as creditors under the award of the auditors, for restoration. His action will lie if the attachment was unauthorized by law, or if the grounds laid did not bring the case under the statute, or if the cause of action was false—that is, if the alleged debt was not due and owing; and he may recover as damages the amount received by the attachment-plaintiffs and such costs and expenses as have been paid out of the proceeds of his property.[1]

The report of the auditor is not in itself conclusive; it requires confirmation by judgment; and the court, because of mistakes of law, may refuse to enter judgment, and may refer the matter back to him.[2] There is not confirmation in the sense that makes the award final, as in ordinary confirmation of default.

The practice in Virginia and Maryland has been similar to that of the States above mentioned with respect to the judgment *nisi* though now modified in some respects.

Judgment *nisi* in foreign attachment, under which the attach-

[1] Schenck *v.* Griffin, 38 N. J. L. 462.

[2] Berry *v.* Callet, 6 N. J. L. 179.

ing creditor sells the *res* without final decree against it, was guarded under a former statute, by the requirement of a bond from the plaintiff to restore the proceeds upon the disproval of the debt within the usual delay. The bond might be to "perform future orders," etc.,[1] but, in Maryland, under this practice, it was held that security to the non-resident defendant was not necessary when a year and a day had already elapsed since the issue of the attachment;[2] and, when that period had not transpired, motion for judgment of condemnation was there allowed prior to filing a bond to restore as required by the act of 1715.[3] A judgment of condemnation on an attachment and possession delivered under a *liberate*, vests the legal title.[4] Though the legal delay of six months, required by the statute, had not elapsed after seizure and before judgment, it was held in Tennessee that title was conveyed by the sale of real estate pursuant to the judgment against a non-resident, notwithstanding the irregularity and reversibility of such judgment.[5]

In Mississippi, under the provision of the code of 1871, § 1479, the attaching creditor cannot sell the attached property of the absent and non-appearing debtor, unless he gives a bond to restore in case the latter should appear within "a year and a day," and disprove the debt. Any sale there, without such security to protect the debtor, is not voidable merely but absolutely void.[6]

By the Tennessee code, § § 3527, 3528, a judgment against an attachment-defendant, not a resident, not served and not appearing, must include what is called a "stay order," to protect him;[7] and such judgment, without this essential, is absolutely void if there has been no publication notice.[8] The reason for the requirement of such stay order is that the judgment is not final until matured by prescription.

[1] Brien *v.* Pitman, 12 Leigh, (Va.) 379; Watts *v.* Robertson, 4 H. & M. 442.

[2] Wallace *v.* Forest, 2 Har. & M. (Md.) 261.

[3] Dawson *v.* Contee, 22 Md. 27.

[4] Plater *v.* Hepburn, 3 Har. & M. 434.

[5] Porter *v.* Partee, 7 Humph. 168.

[6] Hiller *v.* Lamkin, 54 Miss. 14.

[7] Mulloy *v.* White, 3 Tenn. Ch. 9.

[8] Railroad *v.* Todd, 11 Heisk. 549.

By the Virginia code of 1873, ch. 148, § 24, bond is required of the attaching creditor before he can sell, to secure the non-resident debtor who has not been served and has not appeared.[1] And it is there held that a judgment against a non-appearer can have no effect as a personal decree in another State[2] No judgment lacking finality is recognizable beyond the State jurisdiction in which it was rendered.

No *final* judgment by default and confirmation can be rendered against the attachment debtor himself, when he has made no default and could make none because neither cited nor notified. Nor can any be against the property. Property itself can never be defaulted as the fictitious defendant; it is its owner who is liable to that. Property may be condemned by default; that is, the default of its owner who has failed to claim and defend it.

No final judgment whatever can be rendered so as to perfect the creditor's attachment lien when the debtor has not been served with summons, nor has appeared, nor has been invited by publication or other notice. If seizure has failed to compel him to attend, even where made for that purpose, he cannot be said to have been brought into court by his property, to be finally defaulted for not pleading. His property itself is *not in court to be finally adjudicated* so long as he lacks his opportunity of his day there to defend it.

In proceedings *in rem* with general notice, the default is "against all persons," (since all have been tendered their opportunity to claim,) and, upon confirmation, the judgment is final; for the *res* is in court, whoever may be the owner. In proceedings *in rem* with limited notice, only the notified may be defaulted; and, if the limitation is to one, (the owner of attached property for instance,) he alone can be defaulted. The usual formula in the former case is: "The delay allowed by law having expired, and no claim or defense having been filed, it is hereby ordered that all persons having any right, title or interest *in* or *to* the property seized herein be pronounced in contumacy

[1] Anderson *v.* Johnson, 32 Gratt, 558.

[2] Fisher *v.* Marsh, 26 Gratt. 765.

and default, and the libel adjudged and taken *pro confesso.*" If any person or persons have appeared, they are excepted from the order, and all others held in default. Such form would be inapplicable in an attachment suit, in which nothing is proceeded against but the interest of the debtor in the property attached. Default is necessarily confined to him, and whatever ownership or interest others may have is not cut off or affected by the judgment. And he is in default and contumacy only when he has failed to respond to a summons or to publication or other notice.

So long as the non-appearing attachment defendant is not in a condition to be defaulted, his seized property is not in a condition to have final judgment of any sort pronounced against it.

The judgment is not final in Wisconsin, Minnesota and Nebraska, when the debtor has been neither served nor actually notified, (though there has been publication notice,) until the expiration of a legal delay within which he may appear and set aside the judgment upon proper showing.[1] In Iowa there is a like provision;[2] and in other States, some of which have been already particularized.

Sec. 3. Default after Seizure and Publication.

The debtor may be defaulted after seizure and publication. Final judgment may be rendered against the property attached, and nominally against himself, but it will prove effectual against no property of his except what has been attached; it is not susceptible of execution further, as a personal judgment. Such judgment by default against himself cannot be confirmed so as to have the force of a general personal judgment. The proceeding against the property, in such case, is held to be not ancillary but principal. It is doubtless so with some qualifica-

[1] Savage *v.* Aiken, 15 N. W. Reporter, 693. In Nebraska, the debtor may thus appear within five years; in Wisconsin, within three, etc. See Berry *v.* Nelson, 4 Wis. 373; Berry *v.* Doty, 5 Id. 605.

[2] Bond *v.* Epley, 48 Iowa, 606, citing § 2877 of the code providing that such debtor might appear within ten years after the rendition of the judgment, give security for costs and defend the suit. See McClain's Stat.

tion. Whether the attachment is the leading process under such circumstances or not, it is that without which no nominal judgment against the defendant can be rendered. Summons and appearance being wanting, both attaching and publishing are statutory requisites to the judgment perfecting the lien, in most of the States; and both are essential everywhere except where only judgment *nisi* is sought. The requisition of publication precludes the presumption of sufficient notice by seizure even when the property is taken directly from the defendant.

Where the statute does not expressly require publication as a jurisdictional act, if there has been neither service nor appearance, it must still be insisted that since default is nominally a personal judgment there is no reason why the general rule applicable to all personal suits should not be observed; that is, the rule that the defendant must be in *laches* before he can be defaulted.

When there is judgment without service on the debtor and without his appearance, and the property on which it operates proves insufficient to satisfy the debt upon which judgment is given, the unpaid balance may be made the cause of action in another suit; for it is as though no judgment whatever had been rendered respecting it. To such second suit the debtor may plead anything that he could have set up had he appeared in the first, but he cannot set up the attachment judgment as a bar to the suit for the unsatisfied balance.[1] It is not error to render judgment to the full amount of the debt alleged in the petition and affidavit, (though it is inoperative so far as it exceeds the value of the *res*,) for the court can not know the precise value of it at the time the decree is rendered; but it has been held that if the judgment exceeds the amount claimed and set forth in the notice, it is fatally erroneous in a suit bearing only on property.[2] The judgment, where valid, binds the *res* only, though personal in form.[3]

[1] Bliss *v.* Heasty, 61 Ill. 338.

[2] Forsyth *et al.* *v.* Warren, 62 Ill. 68; Hobson *v.* Emporium Co. 42 Id. 306; Hichins *v.* Lyon, 35 Id. 150; Rowley *v.* Berrian, 12 Id. 202.

[3] Parsons *v.* Paire, 26 Ark. 124; Banta *v.* Wood, 32 Iowa, 469; Doolittle *v.* Shelton, 1 Greene, (Ia.) 272; Bates *v.* Delavan, 5 Paige, 299; White *v.* Floyd, Spears Eq.(S. C.) 351.

Sec. 4. Trial upon Issue Joined.

When the answer is a general denial of all the allegations of the plaintiff, the issues to be tried are whether the defendant is indebted as alleged, and whether there was ground for the attachment. For instance, if the charge is that the debtor was about to dispose of his property fraudulently; and he denies this under oath, the attachment must be dissolved unless the plaintiff show that he had reason to believe that such ground existed.[1] And, in order to maintain his attachment on final trial, the plaintiff must not merely sustain the fact of his belief, but must prove that the defendant was about to make fraudulent disposition of his property. When the affidavit is traversed, the *onus* is on the plaintiff to sustain it.[2]

The joinder of issue and the trial thereon, are similar to those of an ordinary case; the usual rules of evidence are applicable; and therefore there is no necessity for their discussion here. Proceedings to dissolve attachment have been hereinbefore considered; and the defendant's cross-action by way of reconvention has been noticed. Judgment for defendant and the order of restoration have been briefly treated. It remains only to consider the trial and judgment when the result favors the plaintiff, and the disposition of interventions and claims by third parties, and the marshalling of competing liens, and the final perfecting of the plaintiff's lien, and execution.

The general practice is to try the attachment upon traverse before the trial of the principal cause; but if the order is reversed, and there is judgment rendered for the plaintiff on the debt-demand, the ancillary suit may be heard afterwards—the officer meanwhile retaining the custody of the *res*.[3] But if the judgment is for the defendant on the debt demand when that is tried first, he is entitled to have his attached property released without further inquiry.[4] When the debt is not due, there should be an order for stay of execution till maturity

[1] Meinhard *v.* Lilienthal, 17 Fla. 501.

[2] Colby *v.* Gould, 16 Fla. 167.

[3] Main *v.* Bell, 33 Wis. 544.

[4] Cramer *v.* White, 29 Iowa, 336. So also if it is a non-suit: Bates *v.* Jenkins, 1 Ill. 25.

before the rendition of a judgment on the attachment process;[1] or there should be no decree till the debt becomes due.[2]

It has been held that the attachment lien is preserved and may be enforced by judgment and execution though the personal proceedings against the defendant, an insolvent debtor, may have been stayed.[3] A defendant may, at the same time, traverse the affidavit and plead to the petition. The two defenses are perfectly consistent: the first going to the writ and the second to the declaration.[4] The two suits may not be against precisely the same defendants; for the principal, personal one may be against a firm and the ancillary action may be against a member of it; and, though no lien could thus be acquired upon the property of the firm, that would be no reason for dismissing the attachment.[5] A plaintiff who has sued in assumpsit may afterwards sue in attachment on the same demand. The two remedies are not inconsistent.[6]

There may be judgment against the attached assets of a partnership, after a member of the firm has been discharged from all personal liability for the partnership debt. Such member has no separate interest in the assets till the firm's debts have been paid.[7] Though the creditor himself may have discharged a partner from all claim, he may afterwards proceed by attachment *in rem* and recover the whole debt.[8]

When a creditor had instituted an attachment suit against three alleged debtors, had obtained personal judgment against one of them and a judgment against the attached property belonging to all, and was attempting to enforce the personal decree against the two whom it did not affect, it was held that neither of the judgments was evidence against them of the amount claimed to be due. The first was held to be *in per-*

[1] Berry *v.* Anderson, 3 Miss. 649.

[2] Ware *v.* Todd, 1 Ala. 199.

[3] Berryman *v.* Stern, 14 Nev. 415, in exposition of 1 Nev. Comp. L. § 434.

[4] Parker *v.* Brady, 56 Ga. 372.

[5] Buckingham *v.* Swezy, 61 How. Pr. 206.

[6] Swartz *v.* Lawrence, 12 Phila. 181. (Pa. Act of March 17, 1869.)

[7] Murray *v.* Mumford, 6 Cow. 441; Canfield *v.* Hard, 6 Ct. 180; Rice *v.* McMartin et al. 39 Id. 573.

[8] Rice *v.* McMartin et al. 39 Ct. 573.

sonam; the second, *in rem.*[1] The latter is no evidence of debt.[2]

When attachment has been sued out in a suit against two persons, there may be judgment sustaining the attachment against one only.[3]

Sec. 5. Intervention.

So far as the personal action is concerned, there is generally no reason for third persons to intervene between the plaintiff and the defendant. The plaintiff, being an ordinary creditor, suing to recover an ordinary debt, cannot deprive a third person of any right which he has against the defendant nor defeat or prejudice any lien which such third person may have upon the defendant's property. Such third person must prosecute any claim which he has in a separate and independent suit, and not come into a suit brought by another to complicate its proceedings. It does not matter to him that the plaintiff in an attachment obtains a personal judgment against his debtor, any more than if it were obtained in any ordinary action for debt. But where an equitable attachment is sued out by a surety to reach lands alleged to have been fraudulently conveyed by his principal, the creditor may interfere if the surety has not paid the debt.[4]

There is generally no reason for intervention in the ancillary proceeding in an attachment suit. As the attaching creditor begins his action when he has no lien, with the purpose of creating one, he cannot effect his purpose to the prejudice of liens already existing. If he causes the attachment of property belonging to the defendant and possessed by him, upon which no previous lien rests, it is manifest that ordinarily no one is directly interested to appear in the suit but the defendant himself. If he attaches property on which some other creditor holds an existing lien without possession, he cannot affect such

[1] Conwell *v.* Thompson, 50 Ill. 329.

[2] Manchester *v.* McKee, 9 Ill. 511; Jackson's Appeal, 2 Grant, (Pa.) Cas. 407; White *v.* Floyd, Spears, (S. C.) Eq. 351.

[3] Allen *v.* Clayton, 3 McCrary, 517.

[4] Peevey *v.* Cabaniss, 70 Ala. 253; Ala. Code, § 3864.

lien-holder's rights, since the attachment is subject to that lien. He can proceed only against the debtor's interest in the thing attached, and that is the property *minus* the interest which the previous lien-holder has in it. It therefore does not concern the lien-holder whether the attaching creditor obtains a junior lien or not. He has no interest to interplead, and hence no right to come into the case and oppose the litigation going on between the plaintiff and the defendant, or urge a judgment in his own favor with recognition of the rank of his lien as paramount to that of the attaching creditor. His time to appear, if at all, is after judgment to claim the proceeds. The hold which he had upon the property is not broken by the judgment and the sale, when the sale is made subject to his lien; and, when it is not, he follows the proceeds, and is awarded his proper rank as a creditor in the distribution.

The attaching creditor, who has perfected his hypothetical lien of attachment by a judgment thereon, is in no better position in respect to a prior lien-holder than that of a junior mortgagee who has had his mortgage recognized by decree, in relation to a senior mortgagee. The junior may issue execution and sell the property but the senior must be fully satisfied out of the proceeds before any can be applied to the payment of the junior. Indeed, the execution and sale are primarily for the benefit of the older lien-holders, and the plaintiff in execution is, in some sense, the agent of such beneficiaries. It is so when the latter cannot issue execution in their own names but must follow the action of the judgment creditor and look to the proceeds for their payment.[1]

[1] This is well illustrated by decisions in Louisiana, where mortgage is a lien without possession. "One holding a prior mortgage cannot prevent the sale of the mortgaged property at the suit of a subsequent mortgagee. He must exercise his right on the proceeds:" Conrad *v.* Prieur, 5 Rob. 55; Tyler *v.* His Creditors, 9 Id. 373; Florence *v.* New Orleans Navigation Co. 1 Id. 224; Fulton *v.* Fulton, 7 Id. 73; City Bank of New Orleans *v.* McIntyre, 8 Id. 467; Bloodworth *v.* Hunter, 9 Id. 256; Joice *v.* Poydras De La Lande, 6 La. 283; Herbert's Heirs *v.* Babin, 6 Martin, (N. S.) 614; Casson *v.* Louis St. Bank, 7 Id. 281; Rowley *v.* Kemp, 2 La. Ann. 360. "The proceeds stood in the place of

If lien-bearing property is attached and prosecuted to judgment, the attaching creditor cannot sell a part of it, sufficient to satisfy his own claim, and leave the prior lien holder bereft of a part of his security. Were the rule otherwise, there would indeed be good reason for intervention. But, since the plaintiff is, in a sense, the agent of the senior lien-holder, when he issues execution, he is bound to sell the whole of the lien-bearing property attached, so as to clear away the prior liens by payment out of the proceeds, and thus enable himself to satisfy his own claim out of any residue. Under such circumstances, he is in duty bound to exhaust the property in order to pay mortgages or other liens outranking his own; and that duty is correlative with the right of the prior lien-holders to have it exhausted.[1] The payment of the superior claims is the first duty of the plaintiff in execution. It is a condition precedent to his privilege of making his own money out of the property; it is the *sine qua non* of his judgment right. He is bound to sell all of the mortgaged property which he has attached; he cannot sell a part to pay the mortgage in part when the mortgage covers the whole and the exhaustion of the whole is necessary to satisfy the lien.[2]

Every portion of property mortgaged is liable for the debt; the mortgage is *tota in toto, et tota in qualibet parte*.[3] Hence, if the *jus ad rem* of a second mortgagee, (or of an attachment judgment-creditor,) should amount to only one-tenth of the value of the property attached, he must sell the whole, unless a part is sufficient to satisfy the anterior mortgage as well as his own. And

the real estate and the same preference was retained on them:" Crum *v.* Laidlaw, 10 Martin, 468; Chipella *v.* Launsse, Id. 448. It was held that "the creditor whose pledge is seized and offered for sale at the suit of another, would not have the right to oppose that sale and to preserve his pledge in kind. His right is that of being paid out of the proceeds." Alexander *v.* Jacob, 5 Martin, 634.

[1] Thelusen *v.* Smith, 2 Wheat. 426; Parsons *v.* Wells, 17 Mass 425; U. States *v.* Hawkins, 4 Martin, N. S. (La.) 317.

[2] So repeatedly held in Louisiana with reference to sales by junior mortgages when rights of seniors were involved: Pepper *v.* Dunlap, 16 La. 163, 169; Florence *v.* Orleans Nav. Co. 1 Rob. 224; Moore *v.* Allain, 10 La. 496; Elwyn *v.* Jackson, 14 La. 411; Adams *v.* Sears, 3 La. Ann. 144.

[3] Bagley *v.* Tate, 10 Rob. (La.) 45.

when the proceeds of the whole have been brought into court, it is time enough for the creditor first in rank to make his appearance and claim to be first paid out of the proceeds.

The senior lien-holder not in possession has no cause to intervene by reason of the attaching creditor's seizure of the property and its coming into the possession of the court under the attachment. The possession is not adverse to him. The attaching is effected with reference to his lien; or, rather, only the defendant's interest beyond what he owes to others and has secured to them by liens, can possibly be made available by the attaching creditor. He cannot set up such adverse possession as would defeat such liens, any more than a junior mortgagee could thus defeat a senior, where mortgage is a mere lien.[1]

Everywhere, in every State, it is true that lien-holders, whether mortgagees or others, who have no possession to be disturbed by the act of attaching the property on which their liens rest, are placed in no worse position by the attachment; are not prejudiced by the court's possession of the attached property; are not injured by the creation of a new lien upon it, and are not deprived of any interest by the perfection of such new lien by judgment, nor by a sale of the property to vindicate such lien after first satisfying all prior liens.

Mortgages are not everywhere mere liens; but where they are so, the mortgagee has no more interest to appear as an intervenor in an attachment suit, than a first attaching creditor has to interfere with the proceedings instituted by a second attacher. In both cases, the prior lien is secure; at least, the subsequent lien does not make it insecure. It matters nothing, to him that is thus provided for, how many new liens and privileges may arise. He has no interest, and therefore no right to come between the plaintiff and the defendant during the pendency of their litigation.

[1] Bank of Louisiana *v.* Stafford, 12 How. (U. S.) 341. And the reason is that the attachment suit is in character like a mortgage suit, when the lien has been perfected by judgment. "The hypothecary action is a proceeding *in rem*, and the third possessor must pay the debt or give up the property:" Moore *v.* Allain, 10 La. 496; "It is a real action, whether the property mortgaged is in the hands of the mortgagor or of a third person:" Elwyn *v.* Jackson, 14 La. 411.

Whether or not a third person may interplead can always be tested by the question of his interest to do so. If he has none, he has no right to complicate the case. If he has interest, and it can only be asserted in somebody else's case and during its pendency, he should be permitted to interplead then and there. Neither court nor legislature can deny him the opportunity of presenting his right and claim somewhere and somehow. He may be regulated by statute or by the established practice, as to whether he may intervene or resort to some other mode; whether he may contest the pretensions of the plaintiff and defendant in their case, or institute an original one of his own; whether he may lie still till disturbed in some way and then resort to an injunction or some other conservative remedy.[1]

A lien-holder in possession cannot have his possession disturbed by attachment sued out by another; and, if it is so disturbed, he may resort to legal resistance, either in the attachment suit or otherwise, as the statutes or the practice there may allow. Where lien-bearing property may be attached, it is always still subject to the existing lien, and there is no general reason why there should be intervention before judgment, and it should not be allowed except where the right to do so is secured by statute.

Here must be noted the radical difference between a proceeding *in rem* irrespective of persons, where the notice is to all the world and all persons are bound by the decree, and a proceeding with respect to a particular debtor, where there is summons or notice to him alone, and he alone can be bound by the judgment.

In the former case, lien-holders must intervene, at some stage, or lose their rights. In some such proceedings, where a libellant asserts a *jus in re*, lien-holders are not allowed to appear; but this rule is almost wholly confined to prize causes[2] which are prosecuted under the law of nations; and even in such

[1] Romagosa *v.* Nodal, 12 La. Ann. 341; Lewis *v.* Harwood, 28 Minn. 428; Crone *v.* Braun, 23 Minn. 239; Rodrigues *v.* Trevino, 54 Tex. 198; Adour *v.* Seeligson & Co. Id. 595; Laclede Bank *v.* Keeler, 103 Ill. 425.

[2] The Eenrom, 2 Rob. (Ad.) 1; The Tobago, 5 Id. 221; The Marianna, 6 Id. 24; The Frances, 8 Cr. 418.

causes it is not inflexible except when the prize is captured in battle. Wherever notice to all persons is published, interested persons, (unless they be enemies,) are privileged to appear; and even an enemy who should deny the enemy character, especially if he should take the oath of allegiance to the government who had taken the prize, might be allowed to invoke the protection of the court which he is no longer fighting to destroy. He could not render that unforfeited which had already acquired the *status* of forfeited property but he could have his opportunity of showing that such *status* had not been acquired. Ordinarily, the government's right to the thing itself because it was enemy property before seizure or capture is paramount to the previously existing rights of all persons in or to such property; but it may invite intervenors and give them standing in court.

Whether such invited persons should come in before or after a judgment pronouncing forfeiture, depends upon the nature of their interests. If they have no motive to prevent a decree of forfeiture or confiscation, they should not appear till after judgment, when they may interpose their rights to be paid out of the proceeds; but if their claims would be lost upon failure to appear before, they may intervene while the case is pending and set up their rights, and contest the rights of the libellant.[1]

The invited interest holder is cut off forever, if he does not respond when the case is against property for forfeiture or con-

[1] The Mary Anne, 1 Ware, 104. In this case, the owners having refrained from claiming and suffered themselves to be defaulted, attaching creditors intervened pending the proceedings and set up their lien by virtue of attachment prior to the seizure by the libellant. Judge Ware said: "The interest of an attaching creditor can only be defended by the same means which will be a defense for the owner whose interest is attached; that is, in this case, by showing that no forfeiture has been incurred. To decide that he cannot make himself a party to the cause before a decree upon the merits, is to decide that he cannot be admitted to defend his rights at all." If the creditors had perfected their lien by judgment before the seizure by the libellant, they might have entered the case in good time after decree of forfeiture and before the distribution of the proceeds, as Judge Ware says a sailor for wages or a material man for supplies might do—they having perfect liens.

fiscation, irrespective of all persons. Even an innocent owner is remediless if he does not appear.[1] His right is *in re* as well as that claimed by the government; and his only recourse, after the general notice of publication, is by intervention in the proceedings.

When proceedings irrespective of persons, with notice to all, are in vindication of a right *ad rem*, both owners and lienholders are privileged to appear; and they must do so, at some stage, or lose their only opportunity of securing their interests. In brief, without further distinguishing between the major and minor right, it is sufficient to say that third persons must intervene, either before or after judgment, or lose their interests, when the proceedings are *in rem* irrespective of persons.

On the other hand, proceedings *in rem* with respect to a person, (such as the ancillary proceeding, with respect to a debtor,) is governed by the opposite rule as to third persons. Their interests are not cut off or affected by judgment against the debtor; they are not notified to appear in the case; and therefore they have no interest requiring their appearance. Their lien rights are protected at all events. They need not come to court, unless to claim payment out of the proceeds of the attached property after sale, when the sale is not made subject to the liens; that is, with the prior liens still resting on the property

Sec. 6. Junior Attachers.

Junior attachers, and the holders of junior liens of any kind, have no right to intervene in the suit of the first attacher, unless authorized by statute to appear, or unless they have some interest which requires assertion in this way.

In some States, debtors are not permitted to sue out junior attachments, but are required to intervene in the first suit, and file their claims under the first attachment, if they choose to create any lien against the property of the debtor which is already attached. They are placed upon equality with the first

[1] Semmes *v.* United States, 91 U. S. 21.

attacher, and therefore have no motive for suing out other writs against the same property. They must appear in the case, therefore, or they will have no attachment liens to assert anywhere or at any time.

In Indiana, every creditor of an attachment defendant may file his claim under the original attachment while it is pending; and, upon establishing his right, he has an equal lien, and shares *pro rata* with the plaintiff in the distribution of the proceeds. No distribution can be had till all the claims of the intervenors have been adjusted.[1] The hypothetical lien attaches as soon as the claim is filed, and is perfected by judgment, like that of the original plaintiff. And it has been held that such claim need not have been due when the original attachment was sued out; and that, if filed when the first claim was pending, subsequent claims are not defeated by the payment of the first.[2]

It is not generally allowable for a junior attacher to come into a senior's suit to contest the debt for which the latter has sued and attached. The subordinate interest which he has acquired, by the subsequent attachment of the same property, constitutes no proper basis for intervention.[3] Such contest is usually deferred till the time of the distribution of the proceeds.

As a general rule, one attaching creditor cannot intervene in the suit of another to defeat it for irregularities in the proceedings.[4] But if the affidavit fails to show debt, the attachment

[1] Fee *v.* Moore, 74 Ind. 319; Cooper *v.* Metzger, 74 Ind. 544; Henderson *v.* Bliss, 8 Ind. 100; Schmidt *v.* Colley, 29 Ind. 120.

[2] Ziegenhagen *v.* Strong, 1 Smith, (Ind.) 174; 1 Ind. 296.

[3] Ward *v.* Howard, 12 Ohio St. 158; Bank of Fayetteville *v.* Spurling, 7 Jones, (N. C.) L. 398. (See Jacobs *v.* Hogan, 85 N. Y. 243;) Harrison *v.* Pender, Busbee, (N. C.) 78. *Contra*, under statute: Swift *v.* Crocker, 21 Pick. 241; Baird *v.* Williams, 19 Id. 381; Carter *v.* Gregory, 8 Id. 165.

[4] Pace *v.* Lee, 49 Ala. 571; Blair *v.* Puryear, 87 N. C. 101; Sims *v.* Goettle, 82 N. C. 268; Copeland *v.* Ins. Co. 17 S. C. 116; Metts *v.* Ins. Co. Id. 120; Ball *v.* Clafflin, 5 Pick. 303; Isham *v.* Ketchum, 46 Barb. 43; *In re* Griswold, 13 Id 412; (See Jacobs *v.* Hogan, 85 N. Y. 243;) Ward *v* Howard, 12 Ohio St. 158; Van Arsdale *v.* Krum, 9 Mo. 397; Whipple *v.* Cass, 8 Iowa, 126; Rudolph *v.* McDonald, 6 Neb. 163; Moresi *v.* Swift, 15 Nev. 215; Mendes *v.* Freiters, 16 Nev. 388; Bank of Augusta *v.* Jan-

may be vacated on application of one who has acquired an interest subsequently to the issue of the attachment.[1] And it has been held that the judgment in favor of a senior attacher, if void for want of service, may be vacated on the motion of a junior attacher.[2]

To maintain an attachment lien and the right of setting aside a prior seizure, the appearer must establish the validity of his own levy. The affidavit of his attorney is not sufficient to establish that fact. It is not the best evidence of which the fact, if true, is susceptible, for the record is better. And if the necessary allegation is not proved, the second attacher fails to show his right to appear for the purpose of vacating the first.[3]

A creditor who has attached property susceptible of manual delivery may contest the validity of a prior assignment and of an execution issued upon a judgment confessed by the debtor.[4] He may enjoin the sale under such execution.[5]

It is competent for a junior attacher to contest the lien of the senior, on the ground of fraud in obtaining it. He may allege and prove collusion between the senior and the defendant. He may stipulate for costs and then be allowed to defend against the first attachment, in the name yet without the consent of the defendant, in order to secure his own interests, and relieve the property from the prior attachment to make way for his own. And what he may thus do, when goods have been thus collu-

don, 9 La. Ann. 8; Fridenburg *v.* Pierson, 18 Cal. 152; McBride *v.* Floyd, 2 Bailey, (S. C.) 209; Kincaid *v.* Neall, 3 McCord, (S. C.) 201; Camberford *v.* Hall, Id. 345; Walker *v.* Roberts, 4 Rich. (S. C.) 561.

[1] Smith *v.* Davis, 29 Hun. 301.

[2] Ferguson *v.* Gilbert, 17 S. C. 26. But see Derby *v.* Shannon, 19 S. C. 526.

[3] Tim *v.* Smith, 93 N. Y. 87, in which Ruppert *v.* Haug, 87 N. Y. 141, and Steuben Co. Bank *v.* Alberger, 78 Id. 252, were distinguished; the court remarking with regard to each of those cases: "The party intervening was a judgment creditor and his lien was secured by a levy upon execution. A manifest distinction has always been made between the position of judgment and general creditors." Is not the holder of an incipient attachment lien to be esteemed something more than a general creditor? Perhaps not when he appears to contest a perfected lien, but otherwise when he seeks to vacate a prior attachment not yet matured by judgment.

[4] Bates *v.* Plonsky, 28 Hun. 112; 64 How. Pr. 232.

[5] Leon *v.* Scram, 58 Tex. 524.

sively attached in the hands of the defendant, he may also do when they have been reached by garnishment, or when a debt due by the garnishee has been thus reached. He may, to defeat the senior's attachment or garnishment, aver and prove that the debt claimed has been paid, or that it never existed. He may even have a judgment rendered in favor of the senior annulled on the ground of fraud and collusion with the defendant. The case is stronger, if the junior attacher already has judgment on his claim against the same defendant. He may then contest the prior judgment-lien of the senior on any ground showing that the latter had no cause of action. Both plaintiffs being in court, he may proceed to set aside such judgment by rule, or otherwise, to direct the distribution of the funds arising from the sale of the property seized, or the debt paid into court by the garnishee.

The junior attaching judgment creditor, not being either a party or a privy to the suit of the senior attaching judgment creditor, has the same right to attack it on any ground when it stands in the way of his interests and rights that any stranger to the litigation would have under similar circumstances. Judgments do not preclude strangers from attacking them. Whoever is without right and power to appear and defend, to contest and appeal, cannot be concluded by a judgment against another which affects himself, in an attachment suit, in which fraud in obtaining preferences is more common than in ordinary causes.

Under circumstances allowing an intervenor to claim attached property, he may do so without reference to any controversy between the parties; the judgment cannot affect the right of property as between himself and the defendant.[1]

The court may vacate the senior attacher's judgment on the ground of fraud and thus wholly destroy his lien. It is not essential that the defendant be a party to the fraud. Where the junior attacher has a judgment against the defendant, and then attacks the prior judgment on the ground of fraud, a court of law may determine the question; and, even if he has yet no judgment, a

[1] Brown *v.* McGehee, 38 Ark. 329.

court of equity would certainly be competent to inquire into the senior's judgment when attacked on the ground of fraud.[1]

There are many circumstances under which the rights and interests of third persons are better protected and enforced by interpleas in an attachment suit. If one has a legal interest in defeating the claim of the attaching creditor, he may properly intervene: for instance, he may plead prescription or any other defense, if the defendant is insolvent.[2] Intervention was held the proper remedy for judgment creditors of the attachment defendant who sought relief against an attachment which they averred to be a fraud upon their rights.[3] And, on the ground that an attachment was improperly and fraudulently levied, junior attachers have been received as intervenors in the proceeding under the first attachment to have it quashed; they alleging that they have an interest thus to appear because the first attachment, if prosecuted to judgment and execution, would leave no property of the defendant out of which the juniors could make their money.[4]

Sec. 7. Claimants.

There are many interests of such a character that they require to be presented in an attachment suit by way of intervention. If a dispossessed owner has no other means of regaining his property seized as that of the defendant; or if a lien-holder's right is such that it depends upon possession, and he is divested of it by an attachment sued out against another, and he has no remedy but by intervention, (though other remedies usually exist, in both the supposed cases,) he ought to be allowed to intervene. It has been held that the holder of a deed of trust to property, given by the defendant after the property had been attached, may intervene to claim the property and controvert the attachment proceedings against it.[5]

[1] Smith *v.* Gottinger, 3 Geo. 140; Hale *v.* Chandler, 3 Mich. 531; Reed *v.* Ennis, 4 Abb. Prac. 393.

[2] New Orleans, &c. *v.* Beard, 16 La. Ann. 345.

[3] Davis *v.* Eppinger, 18 Cal. 378.

[4] Speyer *v.* Ihmels, 21 Cal. 280.

[5] Bamberger *v.* Halberg, 78 Ky. 376.

It has been held that one who intervenes to claim the property attached and contest the defendant's title, may prove statements made by the latter tending to show that he did not own it.[1] But the contest is with the plaintiff; the issue is the fact of ownership and the burden of proof is upon the intervenor, or, rather, the third opponent, which the intervenor properly is.[2] It is the plaintiff whom the intervenor making third opposition must cite; not necessarily the attachment defendant.[3] It is for the intervenor to see that the intervention is put at issue and brought to trial.[4]

It is the claimant's title which is put at issue by his assertion of it under an inter-plea. The title of other third persons, or of the defendant, (especially if absent,) is not affected by the ruling upon the plea. As between the intervenor and the attaching creditor, the decision is conclusive that the thing in dispute is or is not the property of the intervening claimant.[5] As between these two parties, the issue is sometimes such that the intervenor has the affirmative, and sometimes the contrary. If he claims the attached property, he must plead in writing, present matter for issue, and it must be sufficient to support a verdict or judgment;[6] and, as a matter of course, the *onus* is on him to sustain his affirmations; but it has been held that his claim must be taken as true if it is not answered.[7] He must prove the existence of a debt when he sets up its assignment to him as the basis of his claim.[8]

He must always be ready for trial, it is said; but if he has good reason for not being ready with his evidence upon the spur of the moment, his rights and interests ought not to be

[1] Wright *v.* Smith, 66 Ala. 514.

[2] Harper *v.* Commercial &c. Bank, 15 La. Ann. 136.

[3] Gerson *v.* Jamar, 30 La. Ann., Part II, 1294. In Mississippi, when property is attached on mesne process, which is claimed by a third person, the trial of the title is postponed till after judgment against the attachment defendant. Mandel *v.* McClure, 22 Miss. 11; Maury *v.* Roberts, 27 Miss. 225.

[4] Yale *v.* Hoopes, 12 La. Ann. 460.

[5] Hershy *v.* Clarksville Institute, 15 Ark. 128.

[6] Neal *v.* Newland, 4 Ark. 459.

[7] Williams *v.* Vanmetre, 19 Ill. 293.

[8] Blackly *v.* Matlock, 3 La. Ann. 366. See Williams *v.* Piner, 10 Id. 277.

sacrificed or put in jeopardy in obedience to such rule. However, it is a common remark of the courts that an intervenor must be always ready, and cannot be permitted to retard the principal suit.[1]

The burden of proof is, however, (it has been held,) not on the intervenor, if he is a junior attacher seeking to set aside the senior's attachment as improperly and fraudulently made.[2]

The property or funds in the hands of a garnishee may be the proper object of contention between the attaching creditor and a claimant of such property or funds. But the claimant has no right to show that the garnishee has nothing, since he is admitted as a party in the case to establish his claim to what is attached—not to show that nothing is attached.[3]

In Maryland, under the act of 1876, one who has had property taken from him as that of the defendant, may intervene, bond property in double the amount and thus discharge the attachment. He may put both the title of the property and his claim for damages at issue under that act.[4] Whether he is restricted to the remedy by intervention under this law, when notified, is questioned by the Supreme Court of that State.[5] Ordinarily, intervention is optional.[6] Sometimes the attaching creditor may cause a claimant to be made a party; as, in Maine, when the trustee or garnishee has disclosed that some third person claims the fund or property sought to be attached.[7]

The interpleader, whose issue involves only his own title to the property attached, has no interest in the case if the property is not his. He therefore cannot, under such claim, attack any of the plaintiff's previous proceedings in the case on the

[1] Gaines *v.* Page, 15 La. Ann. 108.

[2] Speyer *v.* Ihmels, 21 Cal. 281.

[3] Clark *v.* Gardner et al. & Trustee, 123 Mass. 358, citing Boylen *v.* Young, 6 Allen, 582; Peck *v.* Stratton, 118 Mass. 406. The case turned somewhat upon Mass. statutes, but the principle seems good anywhere. It is said, in the decision: "Evidence that there were no goods, effects or credits of the defendants in the hands of the trustee at the time of the service of the writ upon him would in effect prove the claimant out of court."

[4] Turner *v.* Lytle, 59 Md. 199.

[5] *Id.*

[6] Richardson *v.* Hall, 21 Md. 399.

[7] Look *v.* Brackett, 74 Me. 347.

ground of their irregularity.[1] Such issue as to title cannot be tried on rule in vacation.[2]

While it is no concern of the intervenor whether the attachment was regularly made or not, in case the property is not his but the defendant's, it is his concern if he is really the owner; and he may move to vacate it on grounds proper for him, as the claimant of ownership, to assert.[3] Obviously, he must have interest in the dissolution before he can move to dissolve.[4] Whether his interest is confined to personal property,[5] or may be presented when his realty is involved,[6] it must be such that he would be injuriously affected by the perfection of the attachment in order to entitle him to make the motion for dissolution when he is a mere intervenor in the cause.

After having been adjudged the owner of the attached property, the intervenor may recover damages by suit against the attacher for the wrongful levy.[7]

One who is the owner of property attached as that of another, may either intervene in the suit to claim his property, or he may sue the sheriff or the purchaser without making himself a party to the attachment suit.[8] When he has been adjudged the owner, he has his action against the sheriff for wrongful seizure.[9] The judgment upon the intervention should decide upon his right to the property claimed.[10]

One to whom goods have been constructively delivered, (as by bill of lading,) may successfully intervene in the suit of a subsequent attacher.[11] He has an interest to maintain, without which he could not appear by interplea to recover the property or damages.[12] The garnishor of a debt cannot intervene and

[1] Pace *v.* Lee, 49 Ala. 571; Moresi *v.* Swift, 15 Nev. 215; Davis *v.* Fogg, 58 N. H. 159.

[2] New Orleans *v.* Morris, 29 La. Ann. 241.

[3] Hines *v.* Kimball, 47 Ga. 587.

[4] Long *v.* Murphy, 27 Kan. 375.

[5] Gordan *v.* McCurdy, 26 Mo. 304.

[6] Bennett *v.* Wolverton, 24 Kan. 284.

[7] Frank *v.* Chaffe, 34 La. Ann. 1203.

[8] Rodrigues *v.* Trevino, 54 Tex. 198.

[9] Clark *v.* Brott, 71 Mo. 473.

[10] Hewson *v.* Tootle, 72 Mo. 632.

[11] Adour *v.* Seeligson & Co. 54 Tex. 593.

[12] Mayberry *v.* Steagall, 51 Tex. 351.

claim it as due to himself.[1] It is held in Delaware that no one can intervene without statute authorization.[2]

When interplea has been filed and property claimed, if the judgment is averse to the plea, the intervenor cannot afterwards maintain replevin against the officer.[3] If one intervenes and claims as due to himself a credit attached in the hands of a garnishee, he cannot recover if the attaching creditor abandons the garnishment.[4]

Only the assignee can be heard to prove that the attachment was dissolved by the bankruptcy of the debtor.[5] He is not precluded, by a judgment sustaining attachment on the ground that the fund in the garnishee's hands was fraudulently assigned, from intervening and asserting his rights as assignee.[6]

In Alabama, third persons, shown by the answer to be interested, may be brought into court and made parties;[7] but it is held in Missouri that courts have no right to order non-residents to come into an attachment suit and litigate their rights to an attached fund.[8] In Massachusetts it was held that the conflicting rights of two. distinct, adverse claimants of funds in the hands of a trustee cannot be settled by proceedings under the trustee process.[9] The practice in New York seems to be different.[10]

It has been held that the surety on the dissolution bond of the defendant may become claimant;[11] and that a person, interested before he was summoned by the plaintiff as garnishee, is not precluded from intervening to protect his interest, by reason of the summons.[12]

An intervenor on a trust deed, paid before the attachment

[1] Abernathy *v.* Whitehead, 69 Mo. 28.

[2] Pennsylvania Steel Co. *v.* New Jersey Southern R. R. Co. 4 Houston, 572.

[3] Bray *v.* Saaman, 13 Neb. 519.

[4] Peck *v.* Stratton, 118 Mass. 406.

[5] Golsan *v.* Powell, 32 La. Ann. 521.

[6] Menkel *v.* Gumbel, 57 Miss. 756.

[7] Molton *v.* Escott, 50 Ala. 77; Boyd *v.* Cobbs, Id. 82; Rowland *v.* Plummer, Id. 182.

[8] Sheedy *v.* Second Nat. Bank, 62 Mo. 17.

[9] Peck *v.* Stratton, 118 Mass. 406.

[10] Kelly *v.* Whiting, 51 How. Pr. 201.

[11] Redwitz *v.* Waggaman, 33 La. Ann. 26.

[12] Crone *v.* Braun, 23 Minn. 239.

judgment, can have costs which accrued before payment; and the payment may be proved under the issue.[1]

It has been held that an intervenor, who is a citizen of a State other than that where the suit is pending in which he intervenes, may have the cause removed to the federal court.[2]

Jurisdiction of the question between the interpleader and the plaintiff depends upon the validity of the attachment. If, for instance, there is no legal service of the writ, there is no suit between the parties to the interpleader for want of jurisdiction.[3] The record is before the court and need not be offered in evidence.[4]

Sec. 8. Priority of Seizure.

Judgments, so far as attachment liens are concerned, retroact to the date of the respective levies so as to determine the relative rank of competitors, as a general rule. The Georgia code, § 3331, has been construed to fix priority of liens by the dates of judgments, when an attachment lien comes in conflict with an ordinary judgment, though the levy of the attachment be older than such ordinary judgment, and even older than the commencement of the suit resulting in such judgment. A junior creditor cut up his claim into demands of one hundred dollars each, sued before a justice of the peace by ordinary personal action, thus obtained judgments ante-dating a previously instituted attachment suit in which the levy was anterior to the suits in the justice's court, and he was thus allowed to forestall the attachment lien.[5] But this is anomalous.

In South Carolina and Pennsylvania, attachments levied on the same day rank equally.[6] They are deemed simultaneous; and everywhere simultaneous attachments rank equally. But the rule is different in most of the other States. Generally, the seizure legally made prior to subsequent ones on the same

[1] Helm *v.* Gray, 59 Miss. 54.

[2] Gilman *v.* Wheelock, 10 Bissell, 420.

[3] Gibson *v.* Wilson, 5 Ark. 422.

[4] French *v.* Sale, 60 Miss. 516.

[5] Andrews *v.* Kaufmans, 60 Ga. 669—Jackson dissenting, Id. 673.

[6] Steffens *v.* Wanbosker, 17 S. C. 475; Yelverton *v.* Burton, 26 Pa. St. 351.

day, though ante-dating them but an hour, or even a few minutes, is entitled to the higher rank.[1]

Simultaneous attaching will be deemed to have taken place when several writs have been returned as executed on the same day, if there is nothing to indicate the exact time of the day and all the creditors acquiesce in the return. The officer may be required to specify the precise order of the levies and to state at what o'clock each was made, though his return cannot be contradicted; it is good as far as it goes; it may be completed but cannot be disregarded. It would be no contradiction of the return, should the exact time of the seizure be proved by parol, provided the evidence do not establish a different day from that nominated in the official report; and parol evidence has been allowed when the officer could not or did not make his return precise as to the hour and minute so as to solve the question of priority among competing attachers.

If the hour is specified in the return of one writ, but not in that of another returned as served on the same day, must the first necessarily have priority? It has been thought such is the case, and that the latter return could not be supplemented so as to render it more definite;[2] but if the first be returned as served at noon, there seems to be no good reason for the presumption that the second was served later on the same day. The first has no vested right of priority if the second was, in fact, served at the same time or at a preceding hour. Under such circumstances, the fact becomes important; and the sheriff not only may but should show it by an additional and more pointed return, if in his power to do so. It would not be contradictory of his first return. If not in his power, there seems no good reason why the fact should not be brought out by the testimony of any competent witness who can establish it. It must be borne in mind that the return does not create the lien or fix the order of privilege; it is the act of attaching which does that;—

[1] Lick *v.* Madden, 36 Cal. 208; Tufts *v.* Carradine, 3 La. Ann. 430; Shove *v.* Dow, 13 Mass. 529; Brainard *v.* Bushnell, 11 Ct. 16; Bissell *v.* Nooney, 33 Id. 411; Thurston *v.* Huntington, 17 N. H. 438; Taylor *v.* Emery, 16 Id. 359; Neale *v.* Ultz, 75 Va. 480.

[2] Fairfield *v.* Payne, 23 Me. 498.

the return is but the evidence of the act and of the time of its performance.[1]

If several writs are executed at so nearly the same time that priority cannot be distinctly accorded to any one, they should all rank alike. So, in all cases of doubt, when neither emendation of the returns nor parol evidence is permissible, when neither can settle the question even if admitted, or when all parties acquiesce in the returns or are obliged so to do, the attachments must be treated as simultaneous. There are cases in which a wronged attacher may have his action against the officer because of a return giving him rank below that to which he is entitled, though he may be unable to expose the wrong in contest for priority and to establish the fact that his writ was really executed prior to that of his competitors.

An attachment by the creditor of an individual partner will not affect the lien of a senior attacher who is the creditor of the partnership.[2]

When property has been attached, a second attachment may be laid on it; and, should the first be dismissed, the second may hold against the property and the debtor.[3] It has been held that if the first be prosecuted to judgment upon an answer made by a garnishee after the return of the writ, the later attaching creditors are not forestalled by such judgment.[4] If, however, the return shows that all the property and credits of the defendant, in the hands of the garnishee, have been attached, the creditor is not to be forestalled by subsequent attachers merely because the garnishee's sworn acknowledgement is made after the return. In the practice almost everywhere, the garnishee is bound from the date of the service of the writ and interrogatories upon him; and when he afterwards answers and becomes charged, there is retroaction to the time of the service, so that the creditor's lien takes date from that time;

[1] In real estate attachment, the return has much to do with the *fact* of attaching. It is essential in Maine, to the creation of the lien, that the officer make return to the register of deeds. Bessey *v.* Vose, 73 Me. 217.

[2] Cunningham *v.* Gushee, 73 Me. 417. See Walts *v.* Nichols, 39 N. Y. Sup. Ct. 276.

[3] Coffrin *v.* Smith, 51 Vt. 140.

[4] Southern Bank *v.* McDonald, 46 Mo. 31.

and no subsequent attachment or garnishment can outrank it when the privileges come to be marshalled.

When a fund has been seized; or, indeed, any property or credit, the officer in possession notes the date of subsequent seizures in the order in which the writs come into his hands, and returns the attachments accordingly, since there are no overt acts of re-seizure.[1] Other officers cannot attach so as to deprive him of the possession acquired by the first levy; but all subsequent attachments should be laid upon the first.

Sec. 9. Priority of Garnishment.

When a debtor is about to abscond, or is a non-resident about to fail in business, yet has property in the hands of third persons, it is common for creditors to sue out attachments and summon third persons as garnishees, in great haste, making quite a race for priority. Under such circumstances, it is very common for several writs to be sued out simultaneously, or what is the same thing, served simultaneously; and the notices to garnishees, in the hands of one officer, may be served about the same time. The general rule that the first attachment gives priority of lien over subsequent ones applies to the first garnishment likewise.

The clerk of court ought to issue writs of attachment in the order in which the suits are instituted but is not bound to withhold the second writ because the plaintiff in the first suit fails to call for it in time. When there are several demanded writs ready for issue, he has no right to refuse delivery to the first applicant, who may not be the first of the plaintiffs in the attachment suit. If the first plaintiff thus loses his priority, he must attribute the loss to his own *laches*. Any partiality shown by the clerk to a subsequent plaintiff would render such officer liable for whatever loss might ensue. If he issues a subsequently demanded writ before that first demanded and thus enables a second or later suing creditor to gain the first position in rank of lien, there would be a viola-

[1] Bergman *v.* Sells, 39 Ark. 97; Patterson *v.* Stephenson, 77 Mo. 329.

tion of official obligation on the part of the clerk, and liability in damage to the party injured. No injury would be inflicted however, whatever the *animus* of the clerk, if the first ordered writ should be ready when called for, and should be delivered to the first plaintiff, notwithstanding the second had been first prepared, if the second plaintiff had not received it. If both be prepared simultaneously by different deputies, there would seem to be no necessary partiality or collusion, even though the second plaintiff get his writ first by calling first. In such case the clerk cannot be charged with unfaithfulness or neglect of duty, unless there are other circumstances to show a design to aid one of the attaching creditors to the injury of another, which, coupled with the wrongful act, would constitute malfeasance. But such malfeasance must result in actual loss to the litigant whom the clerk meant to delay, before an action would lie against such officer; at least before an action would lie for anything more than nominal damages.[1]

Garnishments by more than one creditor, competing with each other, take precedence in the order of service, as observed before.[2] This depends, of course, upon the maintenance of the attachments and their perfection by judgment and levy. One who abandons his attachment, though by a compromise with the defendant by which it is agreed between them that he shall take the property attached, and who thereupon dismisses his action, or who dismisses it for any reason, loses his rank, and the junior attachers take the property in due order—the first of the juniors being satisfied, the second succeeding, and so on.[3]

Where there is a limit fixed by statute to the duration of the lien of an attachment upon *mesne process*, (as, for instance, that it shall continue only thirty days after judgment,) the first lien might expire with the period, and the second thus gain the first rank. If there is a final judgment for the defendant in the first attachment suit, the lien of the second, sustained by judgment, would gain the first rank. Though the decree against

[1] Lick *v.* Madden, 36 Cal. 208.

[2] Johnson *v.* Griffith, 2 Cr. C. C. 199; Moore *v.* Holt, 10 Gratt. 284; Erskine *v.* Staley, 12 Leigh, 406; Wilder *v.* Weatherhead, 32 Vt. 765; Bergman *v.* Sells, 39 Ark. 97.

[3] Cole *v.* Wooster, 2 Ct. 203; Brandon Iron Co. *v.* Gleason, 24 Vt. 228.

the defendant be appealable, yet, if not appealed in due time, the lien would be as effectual as if there had been a confirmation of the judgment by the appellate court. The law must be strictly construed when liens are being marshalled; the first attacher who has legally lost his rank cannot regain it in equity.[1]

Priority of garnishment when obtained, like priority of attachment in the hands of the defendant himself, must be followed up by judgment maturing the lien, to preserve it from supercedure in rank by later garnishments. Originally all the creditors are ordinary ones, lienless, standing on equal grounds. The only advantage one has over another in a contest grows out of the superior vigilance and diligence of him who makes the earlier garnishment. The highest rank among the immature liens created by the garnishments, belonging to the first interrogator who has had the garnishee served, may be lost by any act of his that would dissolve the attachment and release the lien.[2] The lien is sometimes said to be dissolved when there is judgment for defendant, but the effect of such judgment is to retroact upon the attachment or garnishment so as to make it nugatory from the beginning. Instead of dissolving a lien, it makes the fact manifest that there never has been a lien in the sense of a right in the thing attached to the amount unjustly or illegally claimed, or claimed under circumstances that never legally warranted the remedy by attachment.

When there is judgment for the plaintiff upon the confession of the defendant, is there a release of the lien so far as junior attachers are concerned? If the confession of judgment is before the return of the attachment writ, it could hardly be said to merge any attachment lien into a judgment lien. Of course the judgment lien would be none the worse for this, so far as the direct relations between the judgment-creditor and the judgment debtor are concerned; but the question is, would such judgment have priority in execution directed against goods or debts attached or subjected to garnishment, over junior judg-

[1] Suydam *et al. v.* Huggeford, 23 Pick. 465.

[2] Suydam *v.* Huggeford, 23 Pick. 465.

ments rendered without confession and pursuant to garnishment or attachment, and for the perfection of the liens? Certainly the first plaintiff could not retain priority of lien by compromising with the defendant, accepting attached property in satisfaction of the claim, and dismissing his suit; and it would seem that a confession of judgment by the defendant, under the circumstances suggested, would give the plaintiff no better position, in relation to competing junior attachers, than such compromise would give.[1] As a general rule, the attaching creditor, during his right to create a lien by the operation of law upon given circumstances, must reasonably follow the law; for, though junior competing creditors are not competent to interfere between him and the defendant for the purpose of pointing out unsubstantial irregularities, they have such right as their interest gives to show that the first attachment has lost its hold by the failure of the senior attacher to follow the law.

An amendment of a writ may be retroactive upon the question of a garnishee's liability. Although there could be no judgment against him on an answer that he owes the firm of which the defendant is a member, yet if afterwards the firm is made the party defendant, the garnishee may be held bound under such answer.[2] Meanwhile, however, the rights of other persons might intervene; writs in other cases might reach the fund or debt as that of the firm, and the retroaction of the amendment would be inadequate in the contest between the

[1] Cole *v.* Wooster, 2 Ct. 203; Murray *v.* Elrige, 2 Vt. 388; Brandon Iron Works *v.* Gleason, 24 Vt. 228; Hall *v.* Walbridge, 2 Aikens, 215.

[2] Sullivan *v.* Langley, 128 Mass. 237: "The first service upon the trustee of a writ in which Alderman, but no partner of his, was then a principal defendant, did not indeed create a valid attachment of the debt due from the trustee to the partnership of J. F. Alderman & Co. Howes *v.* Waltham, 18 Pick. 451; Hoyt *v.* Robinson, 10 Gray, 371; Bulfinch *v.* Winchenbach, 3 Allen, 161. But as soon as the writ was amended by joining Bristol as defendant, the trustee still holding the fund, * * no rights of other persons having intervened, and it being conceded that the two defendants comprised the firm of J. F. A. & Co. and that the fund belongs to them, *the previous attachment became valid*, and the trustee was at once chargeable upon his original answer. * * West *v.* Platt, 116 Mass. 308; Terry *v.* Sisson, 125 Mass. 560; Wright *v.* Herrick, 125 Mass. 154.

writs for priority. The attaching creditor who first garnishees the firm's credit must necessarily outrank him who does so later by a reactory amendment; for the reaction cannot make the attachment as of the original date of the summons, if thereby other persons would be injured.

Although attachment writs may be amended, under certain circumstances, so that the change has a retroactive effect when no interest of others than the parties to the suit are thereby affected, yet a change of circumstances cannot render an attachment valid, if void when executed. The validity must be judged by the facts existing at the time of the levy.[1] If, when the garnishee is summoned, the state of facts then is that he owes the defendant but is under an agreement with him to offset the debt against another, he is not chargeable; and though such agreement should afterwards be abrogated, the change of circumstances will not retroact so as to render the garnishee chargeable on his first summons.[2] He might be reached by a second summons and a second declaration to him by the officer that the property and credits of the defendant are attached in the garnishee's hands, followed by interrogatories; or, a junior attacher might summon such garnishee, disregarding the prior attempt to hold him, and successfully attach in his hands after the agreement had been abrogated. The first attempt, at a time when the garnishee was not chargeable, could have no effect whatever. The second, when the garnishee had become chargeable, would really be the first attachment, and therefore would create the only lien.

Sec. 10. Simultaneous Seizures.

Simultaneous service of several attachments creates equal liens.[3] Equal liens share equally in distribution—not propor-

[1] Hancock *v.* Colyer, 99 Mass. 187; Meacham *v.* McCorbitt, 2 Met. 352.

[2] O'Brien *v.* Collins & Trustee, 124 Mass. 98.

[3] Wilson *v.* Blake, 53 Vt. 305; Steffens *v.* Wanboeker, 17 S. C. 475; Pond *v.* Griffin, 1 Ala. 678; Sewell *v.* Savage, 1 B. Mon. 260; Burkhardt *v.* McClellan, 15 Abb. Pr. 243; Gates *v.* Bushnell, 9 Ct. 530; Fitch *v.* Waite, 5 Ct. 117; Taffts *v.* Manlove, 14 Cal. 47; McCobb *v.* Tyler, 2 Cr. C. C. 199; Grigsley *v.* Love, Id. 413; Howard *v.* Clark, 43 Mo. 344.

tionately to the amounts claimed. In such case, all of the attachments are of equal force, and no just rule can give one the advantage over another. The rule that the law disregards fractions of a day is inoperative when it would work injustice.[1] Were there two equal in date of service, should one be allowed half of his claim and the other the remaining half, or should one take half the proceeds of the property attached and the other the remaining half? The latter is the rule. The creditor claiming a thousand dollars, competing with another claiming five hundred, would get no more than half the proceeds should they amount to one thousand dollars or less. The rule is the same as if there were two simultaneous conveyances of land, when each of those to whom the whole is thus nominally conveyed would take a moiety.[2] The same piece of land, being twice devised in the same will to two different persons, goes half to one and half to the other. Though Lord Coke thought the last devise should prevail and carry the whole, the rule has been settled that either takes a moiety. Competing simultaneous attachments are somewhat analogous to such conveyances and devises. One's right is met by another's equal right, and there is no more equitable rule than to divide the proceeds into aliquot parts and distribute accordingly.[3]

Each of several judgment creditors having complete attachment liens of equal rank, is entitled to have his judgment wholly satisfied out of the attached property, could he have it without injury to his competitors; but, as he cannot, the equitable rule is that the proceeds must be divided as above indicated. The attachers hold *per my et per tout.*[4] Judgment liens were held equal in rank, rendered in cases in which trustee writs had been simultaneously delivered and attachments simultaneously made;

[1] Neale *v.* Ultz, 75 Va. 480.

[2] Coke Litt. 21; Ib. 112, note; Plowd. Com. 541; Countess of Rutland's Case, 5 Coke, 25.

[3] Davis *v.* Davis, 2 Cush. 111; Shrove *v.* Dow, 13 Mass. 529; Campbell *v.* Ruger, 1 Cow. 215; Thurston *v.* Huntington, 17 N. H. 438; Nutter *v.* Connett, 3 B. Mon. 199; Kennon *v.* Ficklin, 6 Id. 414; Clay *v.* Scott, 7 Id. 554.

[4] Sigourney *v.* Eton, 14 Pick. 415.

and an aliquot part was accorded to each judgment creditor.[1] And as two attachments are simultaneous, one cannot acquire priority over the other, with respect to the judgment lien, by the prior issue of execution against the whole of the attached property, even though the other should direct execution against a moiety only and at a later date.[2]

This rule of distribution is not without exceptions. If the aliquot part falling to one of several attachers is greater than the amount of judgment obtained by him, the surplus is divisible among the rest. A *pro rata* division of the proceeds,—the rate having reference to the amount which each attacher has recovered—is the practice in some States.[3]

Sec. 11. Competition with Mortgage Liens.

A creditor who has notice or knowledge of the fact that certain property has been mortgaged, cannot attach it so as to gain priority over the mortgagee, even though his levy should precede the recording of the mortgage. The rule is that he is in no better position than a purchaser with notice would be; and certainly such a purchaser cannot defeat an unrecorded mortgage. It is against conscience—it is fraud in a purchaser, knowing of the mortgage, to collude with the mortgagor in an attempt to do wrong to the mortgagee. It may be said that fraud is the reason for the rule with respect to such purchasers but that that reason will not hold good with respect to an attaching creditor who has notice of the existence of the unrecorded mortgage. It may be said that he has rights as well as the mortgagee; that both may be creditors seeking to secure their just dues, and that his vigilance should prevail over the other's *laches* in the race for priority. But the fact is that between the debtor of both, and the mortgagee, a valid lien has been created upon the property; it is not a lien that will be recognized by the world at large, for want of notice by recordation;

[1] Rockwood *v.* Varnum, 17 Pick. 289, 292.

[2] Durant *v.* Johnson, *et al.* 19 Pick. 544.

[3] Porter *v.* Earthman, 4 Yerg. 358; Love *v.* Harper, 4 Humph. 113; Hill *v.* Child, 3 Dev. 265; Freeman *v.* Grist, 1 Dev. & Bat. 217.

but it is one that the notified creditor, who subsequently attaches, is bound to respect; and, although he may attach without collusion with the debtor, yet could he succeed in his attachment he would knowingly do the mortgagee a wrong; he would collect his debt of property from which the mortgagee had the right of collecting his; he would thus defraud the mortgagee.

The rule seems to be well founded that an attaching creditor with notice of an unrecorded mortgage cannot acquire a higher lien than that which the mortgagee has previously acquired, and cannot put himself in a better position, with respect to the mortgage, than the purchaser with notice of such unrecorded mortgage would occupy.[1]

The attaching creditor, however, would gain rank above the mortgagee, should he attach, without notice and in good faith, prior to the recording of the mortgage.[2] And so also if the mortgage is recorded but with an inadequate description of the debt to be secured[3]—not sufficient as notice.

If knowledge is proved, creditors are incapable of creating a lien in their own favor, by attachment of the mortgaged prop-

[1] Mean *v.* New York, Housatonic & Northern R. R. Co. 45 Ct. 225; Sibley *v.* Leffingwell, 8 Allen, 584; Lawrence *v.* Stratton, 6 Cush. 167; Pomeroy *v.* Stevens, 11 Met. 244; Curtis *v.* Munday, 3 Met. 405; Coffin *v.* Ray, 1 Met. 212; Priest *v.* Rice, 1 Pick. 164; Prescott *v.* Heard, 10 Mass. 60; Daniels *v.* Sorrells, 9 Ala. 436; Dixon *v.* Lacoste, 1 Smedes & M. 70; Taylor *v.* Echford, 11 Id. 21; Walker *v.* Gilbert, Free.... (Miss.) 85; Morton *v.* Robards, 4 Dana, 258.

[2] Hurt *v.* Redd, 64 Ala. 85; Carter *v.* Champion, 8 Ct. 549; Theall *v.* Disbrow, 39 Ct. 318; Bacon *v.* Thompson, 14 N. W. Rep. 312, re-affirming Boothby *v.* Brown, 40 Ia. 104, and Hickok *v.* Buell, 51 Ia. 655, and overruling Kessey *v.* McHenry, 54 Ia. 187. See Cummins *v.* Tovey, 39 Ia. 195; Allen *v.* McCalla, 25 Ia. 464, 482; McGarran *v.* Haupt, 9 Ia. 83; Crawford *c.* Benton, 6 Ia. 476; Miller *v.* Bryan, 3 Ia. 58.

[3] Bramhall *v.* Flood, 41 Ct. 68. The rule is, in Connecticut, that "the condition of a mortgage deed must give reasonable notice of the incumbrance on the land mortgaged in order to affect the creditors of the mortgagor who have no notice of the real incumbrance." Pettibone *v.* Griswold, 4 Ct. 158; Shepard *v.* Shepard, 6 Id. 37; Stoughton *v.* Pasco, 5 Id. 444; Hubbard *v.* Savage, 8 Id. 215; Booth *v.* Barnum, 9 Id. 286; Sanford *v.* Wheeler, 13 Id. 165; North *v.* Belden, Id. 376; Hart *v.* Chalker, 14 Id. 77.

erty, of such character as to outrank the mortgage. It has been thought fraudulent for a person, with notice, to attempt to forestall such a lien while the lien-holder is using due diligence to get it recorded.[1]

If, however, the lien is not yet good between the contracting parties, the creditor wishing to attach is not bound to respect the intention of those parties. They may intend to make a mortgage, and the attaching creditor may make his lien first. This he has the right to do; and an attachment lien created under such circumstances will outrank a mortgage subsequently made and duly recorded,[2] and will be in advance of an assignment not fully consummated.[3]

One who takes a mortgage on attached property is presumed to have notice of the attachment;[4] and he takes rank below the attaching creditor,[5] just as any later attacher does. The ownership of the attached property being in the defendant up to the time of sale, he is perfectly competent to mortgage it, or to create any other form of lien, by convention, though he cannot, by any such act, dislodge the lien previously acquired by the first attacher. In marshalling the liens, they are ranked according to their date, whether they are attachment liens, mortgages or privileges of any other description, except such as have priority of law because of their nature—such as court costs, burial expenses and the like. The law of notice applies to all, though presumption of notice varies in different States. Where recordation of attachment liens are required in order to give notice to third persons, the attacher cannot neglect it with impunity.

[1] Priest *v.* Rice, 1 Pick. 168.

[2] Cushing *v.* Hurd, 4 Pick. 253, 257.

[3] Warden *v.* Adams, 15 Mass. 233.

[4] Fee *v.* Moore, 74 Ind. 319.

[5] Huxley *v.* Harrold, 62 Mo. 516. In Indiana, where creditors may come into the original attachment suit and file their claims, all to be paid *pro rata* if allowed, all of such junior attaches will outrank the mortgagee whose mortgage is later than the original attachment though older than the filing of the junior attachers' claims. Fee *v.* Moore, 74 Ind. 319. In this State the right of creditors to file claims terminates with the final judgment and order of sale of the attached property. Cooper *v.* Metzger, 74 Ind. 544, in construction of 2 R. S. of Ind., 1876, p. 110.

After two tracts of land have been attached, one of them may be released and the other held to secure the whole amount of the claim sued upon. If, after the attachment of both, the debtor should mortgage one tract, and that tract should be the one upon which the attachment is retained, the mortgagee will not be entitled to priority over the attaching creditor to the amount of the value of the released tract. In other words, the attaching creditor did not give up his right to make all his claim out of one tract by releasing the other from seizure.[1] The attachment was *tota in toto, et tota in qualibet parte.* Every portion of the property attached was liable for the whole of the debt which the attachment was meant to secure. This doctrine has been held with respect to a mortgage,[2] and the same reasoning will apply to an attachment.

If one of two tracts of land, or one of two articles of personal property, after attachment, has been released, it is as though it had never been attached; so that a mortgage put upon it after attachment, or a second lien by attachment put upon it after the first attachment would hold good, without the necessity of removal, as the highest privilege continuing to exist against the property.

Though a mortgage of personal property be given merely to secure the mortgagee against liability as endorser for the mortgagor, the lien thus created outranks that made by a subsequent attachment of the property thus mortgaged. Though the note endorsed may not have matured, and the lien upon the mortgaged property be therefore contingent, yet the mortgagee has preference over the attaching creditor.[3]

The creditor, if not prevented by the mortgage lien from attaching, may tender to the mortgagee the amount of his eventual liability, if he wishes to remove the prior lien. By paying or tendering that amount, the creditor can retain his attachment.[4] The officer could not take actual possession of the property, so as to detain it under the attachment writ, unless

[1] Johnson *v.* Bell, 58 N. H. 395.
[2] Bagley *v.* Tate, 10 Rob. (La.) 45.
[3] Rogers *v.* Abbott, 128 Mass. 102.
[4] *Id*; Bicknell *v.* Cleverly, 125 Mass. 164; Codman *v.* Freeman, 3 Cush. 306; Flanagan *v.* Cutler, 121 Mass. 96; Goulding *v.* Hair, 133 Mass. 78.

the creditor should pursue this course, when the mortgagee has the custody of the property. The latter would be the lawful custodian. If, under such circumstances, the property should be attached, as in the hands of a third person, and the mortgagee garnished, the lien so created would be subsidiary to that of the mortgage. If the attaching creditor would gain immediate custody of the thing by the officer, he must first pay the mortgage.

Though a partner may have mortgaged partnership property to secure his individual creditor, the latter will not have a higher privilege than a creditor of the firm who subsequently attaches the same property for a debt of the firm. Such attachment lien will outrank the mortgage, as it will also outrank a prior attachment against the same property in a suit against one of the partners only for his separate debt.

A mortgage upon property of a partnership executed by a member thereof to secure his separate debt will hold good if the other members release their claims upon the property thus mortgaged. Though at the time such mortgage is given, the mortgagor owns only his share of the surplus after partnership debts are paid, and although the release of the claims of other partners is made after the execution of the mortgage, yet the act purported to cover the entire property, and the release by the other partners is a ratification of the act.[1]

There is a condition when the lien, by mortgage or by attachment, depends upon a settlement of the partnership affairs: there is none, when the lien is upon partnership property in a suit against the partnership. This seems to be the only reason why an attachment lien on partnership property created by a suit against a partnership should be allowed to outrank a prior lien created against such property in a suit against a member of the firm for his own debt.

To seize and hold what the defendant has sold and delivered, fraud and indebtedness to the plaintiff before sale must be proved.[2]

One who has a lien on goods for money advanced must have

[1] So held substantially in Fargo *v.* Ames, 45 Iowa, 491.

[2] Day *v.* Kendall, 60 Iowa, 414.

it recorded or must give notice to an attaching creditor if he would maintain his lien as superior to that of such creditor.[1] If the attacher knows of the existence of the lien for advances, or that of a vendor for purchase money, it is immaterial from what source his knowledge is obtained; he is bound to respect it.[2] Any notice of such pre-existing liens answers the purpose of recording, so far as the attacher is concerned.[3] The burden is on the prior lien-holder to show notice;[4] and it has been thought that he must show that the notice emanated from himself;[5] but if the attacher knew of the fact it ought not to matter whence his information came. Whenever knowledge is brought to the court that attached property does not belong to the debtor free from incumbrance, but that there are liens resting upon it older than the attachment lien, there should be no disposition made of it which would pay the attaching creditor at the cost of the prior lien-holders.

If, prior to attachment, the defendant has put property into the hands of one of his creditors to be held till payment, the person thus holding has a lien superior to that of the subsequently attaching creditor.[6] If, after the issue of the writ, the sheriff holds it up by the plaintiff's order, the defendant may make a valid mortgage which will outrank the attachment lien created by a subsequent levy.[7] This is the law of priority everywhere except in States where, by statute, the attachment lien arises upon the issue of the writ. The debtor may not only create a valid lien by convention while the writ is in the sheriff's hands but unserved; he may make a genuine sale of the property sought to be attached. Either a sale or a mortgage, made under such circumstances, may be in good faith.

The attaching creditor may contest the mortgage, and resort

[1] Quinn *v.* Halbort, 55 Vt. 224, 227.

[2] McPhail *v.* Gerry, 55 Vt. 174.

[3] Kelsey *v.* Kendall, 48 Vt. 27; Allen *v.* McAlla, 25 Iowa, 464; McGovern *v.* Haupt, 9 Id. 83; Boyd *v.* Beck, 29 Ala. 703; De Verdal *v.* Maloone, 25 Id. 272; Dearing *v.* Watkins, 16 Id. 20; Smith & Co. *v.* Zuchee, 9 Id. 208; Magee *v.* Carpenter, 4 Id. 469.

[4] Whitcomb *v.* Woodworth, 54 Vt. 544.

[5] Stevens *v.* Wrisley, 30 Vt. 661; Bank *v.* Drury, 35 Id. 469.

[6] Greely *v.* Reading, 74 Mo. 309.

[7] Gray's Administrator *v.* Patton's Administrator, 13 Bush. 625.

to all the grounds the mortgagor could urge against the mortgagee, in order to protect his attachment lien.[1]

The attachment operates only on the defendant's interest; it cannot displace the lien of a third party already acquired, nor affect his title;[2] but if there is illegality in the act of mortgage, the attaching creditor is competent to show it. He not only has all the rights of the mortgagor in his attack upon the mortgagee, but more: he is not estopped from exposing a simulated transaction when the attachment-defendant was a party to the fraud.

Sec. 12. Sale by the Debtor before Seizure.

The title to real estate passes from the vendor to the vendee upon the completion of the contract, and the delivery of the deed is conclusive between the parties. The recording of the deed relates back to the date of the contract, though not in such sense as to affect the title of a *bona fide* purchaser who has bought after such contract and before such recording. The object of the record is to give notice to the world, and to protect subsequent purchasers from imposition as well as to secure the first vendee from disturbance.[3] But registry is not an exclusive means of notification. Knowledge of the contract of sale and delivery of the unrecorded deed, however acquired, is equivalent to registry, so far as the second purchaser is concerned. Such second purchaser, with knowledge of the first sale, could not perfect his title by having it recorded prior to the registry of the first transaction, since both his purchase and his registry would be vitiated by his fraud.[4] The *onus* of establishing such fraud by proving knowledge on the part of the second purchaser would be upon him who should attack such recorded title; and he would be required to prove it

[1] Pierce *v.* Hall, 12 Bush. 209.

[2] Metts *v.* Ins. Co. 17 S. C. 120.

[3] Hall *v.* Gould, 79 Ill. 16.

[4] Worseley *v.* De Mattos, 1 Burr. 474; Le Neve *v.* Le Neve, 3 Atk. 654; Jackson *v.* Sharp, 9 Johns. 168; Jackson *v.* Burgott, 10 Id. 457; Dey *v.* Dunham, 2 Johns. Ch. 190; Norcross *v.* Widgery, 2 Mass. 506; Farnsworth *v.* Childs, 4 Id. 637; Davis *v.* Blunt, 6 Id. 489; Prescott *v.* Heard, 10 Id. 60.

clearly, since it would not suffice to render the fraud merely probable.[1]

An attacher of land, who knows that his debtor has sold it though the deed of sale has not been recorded, is in the same predicament as that of a second purchaser with such knowledge. The title having passed from his debtor, he cannot attach the property as that of his debtor without attempting a fraud upon the vendee.[2] But the *onus* is upon the vendee or grantee to show knowledge of his purchase on the part of the attaching creditor, in case of contest between them. If he has not come into possession, or made improvements, or performed some act of ownership, the presumption would be against the grantee who has not recorded his title.[3]

An attacher of land who does not know that his debtor has sold it, may validly attach it before registry of the sale,[4] even though the deed is in the hands of the registrar for the purpose of being recorded.[5] In such case, though the attaching precede the recording but for an hour, the creditor is entitled to the benefit of the maxim, *prior in tempore, potior in jure.* This rule, however, is not universal. There is a statutory provision in California, under which it was held that a deed executed prior to the levy of a writ of attachment, but recorded afterwards, will outrank the attachment.[6] And in Missouri it was held that a deed made prior to an attachment but recorded afterwards, before the attachment sale, would rank the attachment lien.[7]

So far as knowledge of a previous conveyance affects the validity of the transaction, the attachment of land is like the purchase of it. Both the attacher and the purchaser of land which they know to have been conveyed previously, are alike at

[1] Hine *v.* Dodd, 2 Atk. 275; Jackson *v.* Given, 8 Johns. 137; Jolland *v.* Stainbridge, 3 Ves. Jr. 478; Norcross *v.* Widgery, 2 Mass. 506.

[2] Lamberton *v.* Merchants' National Bank, 24 Minn. 281.

[3] McMechan *v.* Griffing, 3 Pick. 149, 157; Priest *v.* Rice, 1 Pick. 164; Doe *v.* Routlege, Cowp. 712; Wyatt *v.* Barwell, 19 Ves. Jr. 435.

[4] Jackson *v.* Chamberlain, 8 Wend. 620; Jackson *v.* Post, 15 Id. 588.

[5] Sigourney *v.* Larned, 10 Pick. 72.

[6] Hoag *v.* Howard, 55 Cal. 564.

[7] First National Bank *v.* Hughes, 10 Mo. App. 7.

fault. What is sufficient notice to the one is sufficient to the other.[1]

Considered as in the nature of a purchaser, the attaching creditor is deemed to have made his purchase at the time of the laying of the attachment writ upon the land; for, if execution should follow, the purchaser at the sale would look to the state of things existing when the property was attached. So far as the validity of the title is concerned, the legal creation of the attachment lien is all important. If notice of a prior deed, unrecorded, would strike the attachment with nullity, (as it would strike a purchase,) *when* must such notice be conveyed to the creditor: when he attaches or when he proceeds under execution after judgment in an attachment case? It is when he attaches—execution being merely the effectuating of the act then begun.[2] An attaching creditor can be on no higher ground than his debtor, in attaching equitable interests.[3] He cannot maintain an action to redeem land, covered by his attachment, from a mortgage executed by his debtor.[4]

An attachment lien will not hold good against an equitable title. Land sold, with the deed not recorded, cannot be attached as the property of the vendor so as to defeat the vendee's unrecorded title, if the vendee was in possession before the levy, thus putting the attaching creditor upon inquiry.[5] If, however, a valid attachment lien has been acquired, it would not be lost by the defendant's subsequent gaining of possession by moving upon the land.[6]

Sec. 13. Assignment.

The owner of a promissory note assigned to him, which is not governed by the law merchant, holds it subject to all equities existing before the assignment. He cannot disturb the

[1] Coffin *v.* Ray, 1 Met. 212, 215; Priest *v.* Rice, 1 Pick. 164; Somes *v.* Brewer, 2 Id. 184.

[2] Coffin *v.* Ray, 1 Met. 212.

[3] Wood *v.* Thomas, 39 Tenn. 160.

[4] Fisher *v.* Tallman, 74 Mo. 39.

[5] Tucker *v.* Vandemark, 21 Kan. 263, 268; Moore *v.* Reaves, 15 Kan. 150; Johnson *v.* Clark, 18 Kan. 157; School District *v.* Taylor, 19 Kan. 287; Greer *v.* Higgins, 20 Kan. 420, 426.

[6] Hiatt *v.* Bullene, 20 Kan. 557.

rights of third persons acquired through judicial proceedings brought by an attaching creditor, (who has no notice of the assignment,) against the maker of the note. Even a mortgage may be foreclosed in such an attachment proceeding, and the purchaser of land mortgaged to secure such a note as that above suggested, would acquire good title to the land, and would hold it discharged of the mortgage.[1] A judgment rendered against the maker as garnishee, in an attachment suit against the payee, is a good defense to an action against the maker by an assignee of the note, brought on the note, if the maker had had no notice of the assignment when the judgment was rendered against him as garnishee.[2]

In New York it was held that the sheriff's title relates back to the time of the demand and gives the attaching creditor a lien ranking that of a subsequent assignee.[3] When property capable of manual delivery has been levied upon by a sheriff under a warrant of attachment, the attaching creditor may maintain an action to have a prior assignment, (executed by the defendant,) declared fraudulent and void, and to have the priority of his attachment lien established. And he may do so, though the defendant has confessed judgment in favor of the assignee, and execution has been issued upon such judgment.[4] The sheriff, if sued by the assignee for making the attachment levy on the property as that of the assignor, may show that the assignment was void as to the attaching creditor.[5] But the fact that a general assignment is void, by reason of an insertion in the act authorizing compromise with debtors and sale upon credit, does not authorize an attachment to issue under § 636 of the Code of Procedure.[6]

In Rhode Island, an assignment must be without preference, in order to discharge an attachment, except the preference specially authorized by statute;[7] and there, the assignment of

[1] Sharts *v.* Awalt *et al.* 73 Ind. 304.

[2] Canaday *v.* Detrick *et al.* 63 Ind. 485; Greenman *v.* Fox, 54 Ind. 267; The Ohio & Miss. &c. Co. *v.* Alvey, 43 Ind. 180; Barton *v.* Allbright, 29 Ind. 489; Schoppenhast *v.* Bollman, 21 Ind. 280; Shetler *v.* Thomas, 16 Ind. 223.

[3] Anthony *v.* Wood, 29 Hun. 239.

[4] Bates *v.* Plonsky, 28 Hun. 112.

[5] Carr *v.* Van Hoesen, 26 Hun. 316.

[6] Milleken *v.* Dart, 26 Hun. 24.

[7] Noyes *v.* Johnson, 13 R. I. 183.

partnership property only, when the debtor has other assets, will not avoid an attachment.[1]

A debtor's assignment of his property held by a third person will not hold against a prior attachment in the hands of such third person though the sheriff had been denied possession on demand.[2]

An assignment made in one State, of personal property in another, is doubtless good as between the assignor and the assignee so soon as it has been executed, and actually or constructively delivered. If mailed to the assignee, it is constructively delivered to him as soon as it is put into the post-office, since the carrier's possession is that of him to whom he bears the letter or package. No actual delivery of the personal property described in the assignment is absolutely necessary to the completion of the title of the transferee.[3]

Is such assignment good as to third persons? Would it defeat an attachment of the property made after the mailing of the instrument by the assignor and before its receipt by the assignee? That must depend upon the *lex rei sitæ*. If the assignment, made in another State, is valid against third persons by the law where the property is situated; if the policy and the juridical morals of both States agree; if the assignment would not have contravened the law of the State in which it is to be executed, had it been made there, the transfer is good as to third persons; and it would defeat an attachment made after the constructive delivery of the instrument but before its actual receipt by the assignee.[4]

In Missouri it was held that an assignment which was void by the law of another State where it was made, would outrank an attachment made in Missouri by a non-resident, when the assignment was delivered before the attachment was served, and was recorded before the writ of execution under the attachment judgment had been issued, since the assignment was such as would have been valid if made in Missouri.[5]

[1] Aldrich *v.* Arnold, 13 R. I. 655.
[2] Anthony *v.* Wood, 29 Hun. 239.
[3] Johnson *v.* Sharp, 31 Ohio St. 618.
[4] Id.
[5] First National Bank *v.* Hughes, 10 Mo. App. 7.

If an assignment is valid where made but void where it is meant to have effect, it ought not be maintained against a subsequent attachment made at the latter place. If the law of the former place allows preference among creditors to be created by the assignment, while that of the latter inhibits such practice as fraudulent, the assignment cannot be enforced in the latter.

A general assignment by an insolvent, for the benefit of all his creditors, cut off an attachment made within four months before the assignment, by provision of the late bankrupt law of the United States. The adjudication vested the property in the assignees.[1] As that law is no longer operative, it seems idle to discuss whether the right of an attaching creditor, vested under the statute of his State, could be constitutionally divested by a subsequent general assignment in bankruptcy.

Under a statute of Nevada, the attachment lien is preserved and may be enforced by judgment and execution, notwithstanding an order staying proceedings against the insolvent debtor in pursuance of the act for the relief of insolvent debtors.[2] In Oregon, attachment is dissolved by an assignment to creditors, and a subsequent judgment and sale in the attachment proceedings are void.[3]

In any State having a general statute of this character, it must be considered that a creditor suing out an attachment does so subject to the law; that his right by reason of his attachment is only conditionally vested.

An attachment lien on the property of a firm was held to entitle the holder, who had had it matured by judgment, to intervene in a bankruptcy proceeding against the property of the firm, subsequently surrendered, because one of the two members of the assigning firm lived out of the country so that the court could not adjudge both to be bankrupts.[4] This seems right when it is considered that the intervenor's judgment was

[1] U. S. Rev. Stat. § 5044; Barker *v.* McLeod, 14 Nev. 148, 152; Goodhue *v.* King, 55 Cal. 377; Risley *v.* Brown, 67 N. Y. 160; Miller *v.* Bowles, 58 N. Y. 253; Morgan *v.* Campbell, 22 Wall. 381; West Phila. Bank *v.* Dickson, 95 U. S. 180.

[2] Benjamin *v.* Stern, 14 Nev. 415.

[3] McKinney *v.* Baker, 9 Or. 74; Tichenor *v.* Coggins, 8 Or. 270.

[4] Burton *v.* Watson's Case, 9 Ben. 324.

against the property that had been attached. But, after the filing of the petition in bankruptcy, no attachment lien could be subsequently obtained that would support an intervention in the bankruptcy proceedings, if all the bankrupts are legally before the court.[1]

An assignment of partnership property by one member of the firm, if ratified afterwards by the firm, was held good from its date as to the assignee but not as against a creditor who had attached before the ratification.[2]

In Georgia, an attachment suit need be against no more than one partner, though brought on a debt of the firm;[3] and that is so wherever there is solidarity of obligation. If the interest of one partner is to be executed under a judgment against him, property belonging to his firm may be seized in order to sell such interest, in Kansas.[4]

Sec. 14. Final Decree with Privilege.

Judgment for plaintiff after issue joined is complete as a personal one, and may be executed against any property of the defendant not exempt by law; and therefore there is no need to enlarge upon it in a work on attachment. It is like other personal judgments.

Such judgment, however, in attachment suits, is usually attended by the addition: "With privilege on the property attached." This, or equivalent words, is a judicial recognition of the attachment lien; a perfection of the previously incipient right; an elimination of the hypothetical feature of the *jus ad rem*. It is a judgment against the property; a judicial finding that it is an indebted thing, and a virtual condemnation of it to pay its owner's debt. Whether such decree *in rem* is made by the insertion of the clause above quoted or its equivalent, or is made by implication only in the personal judgment, or is rendered formally in an ancillary proceeding conducted separ-

[1] Vogel & Reynolds' Case, 9 Ben. 498.

[2] Holland & Pettitt, *v.* Drake, 29 Ohio St. 441.

[3] Cannon *v.* Dunlap, 64 Ga. 689; Ga. Code, § 3276.

[4] Hershfield *v.* Claflin, 25 Kan. 166.

ately from the principal, the effect is the same. Implication is recognized in some of the States and not in others; but, where it is recognized, the lien is perfected as well as if the privilege were expressly decreed in the judgment.[1]

The implication does not exist if the attachment has been terminated during the proceedings, nor if there is anything in the final decree showing that the recognition of privilege on theproperty is not designed.[2]

It was held, however, in Missouri, that if a general judgment is rendered after attaching and publishing, it is not void as to the excess above the value of the *res* but is valid till reversed; that it will authorize a special execution against the property attached and will bind no other property of the defendant; and that the form of the judgment may be corrected by an entry *nunc pro tunc*.[3] There should be a recognition of the privilege; and that would be effected if special execution on the property attached is awarded in the decree.[4]

It is also held in Missouri, that if there has been a general appearance of the defendant in the case, the judgment should be general—not special against the property attached.[5] It is held there that under such judgment, the attached property need not necessarily be sold; that if there is other property sufficient to satisfy the execution, the defendant may surrender it, and retain the attached property if he chooses to do so.[6] It is true, not only in that State but in every other, that if the defendant has appeared, the personal judgment against him is a general one which may be executed against any property of his, and that he may point out what he prefers to have executed if the plaintiff does not insist upon having his lien vindicated

[1] Betancourt *v.* Eberlin, 71 Ala. 461, 467; Coleman *v.* Waters, 13 W. Va. 278; Young *v.* Campbell, 5 Gilman, 80; Waynant *v.* Dodson *et al.* 12 Iowa, 22.

[2] Wasson *v.* Cone, 86 Ill. 46; Love *v.* Voorhies, 13 La. Ann. 549.

[3] Massey *v.* Scott, 49 Mo. 278.

[4] Johnson *v.* Holley, 27 Mo. 594.

[5] Maupin *v.* Va. Lead Mining Co. 78 Mo. 24; Borum *v.* Reed, 73 Mo. 461; Philips *v.* Stewart, 69 Mo. 149; Huxley *v.* Harrold, 62 Id. 516; Jones *v.* Hart, 60 Id. 351. See Kenrick *v.* Huff, 71 Mo. 570, in which an attached fund was lost by the insolvency of the officer and his sureties.

[6] Kritzer *v.* Smith, 21 Mo. 296; Jones *v.* Hart, 60 Mo. 351.

against the property attached. The satisfaction of the judgment in any way would relieve the attached property of the lien. But it is not true that an attachment-judgment bears upon all the defendant's property alike, because of his personal appearance in the case. The recognition of the attaching creditor's privilege upon the property attached is seen to be all important when there are rival attachers, and several judgments against the defendant. The attacher who holds the oldest lien, matured by judgment, has priority over his competitors in executing the particular property on which his lien rests. It is as important a privilege to him, as the right to foreclose a mortgage on hypothecated property is to the mortgagee.

Doubtless the personal judgment against the defendant who has appeared, or who has been served with summons, should be general in Missouri and in every State, so as to be operative on any property of his; but it is also undoubtably true that the hypothetical lien created on the thing attached should be recognized, expressly or impliedly, in the judgment, and thus converted to a specific lien as sacred as a mortgage, so that the judgment-creditor can make his money out of the execution and sale of that thing to the exclusion of other creditors. Should such lean-bearing property prove insufficient to satisfy the judgment, other property may be executed under the personal judgment; and, when that becomes necessary, the defendant may point out property to the sheriff as in any ordinary suit. Or the judgment creditor may voluntarily abandon his lien and make his money out of any property.

Where there is but one attachment suit against the defendant, and judgment has been rendered against him after service or general appearance, it would work no wrong to the plaintiff should other property than that attached be pointed out and the judgment satisfied out of the proceeds of the sale; but, until it has been thus satisfied, the lien upon the attached property remains inviolate. When satisfied, the lien disappears just as a mortgage or any specific lien whatever would be removed by payment of the debt which the lien existed to secure.

Because the appearance of the defendant makes him amenable to the rendition of a personal judgment against him, it does

not follow that there can be *only* a personal judgment. If the attaching were only to "bring him into court by his property," to "compel appearance," etc., and were without any other significance, it would logically follow that personal appearance would dissolve it, so that no lien could be matured by judgment; but attaching is not thus confined in its functions now, as it is understood in most of the States.

When the decree is neither expressly nor impliedly confirmatory of the attachment lien, it can have no reference to, or bearing upon, the forthcoming bond, if one has been executed by the defendant; and the money due by such judgment cannot be made by a suit on that bond. For the duty assumed by the obligors is to restore the attached property should the attachment be sustained by the judgment. Such bond does not dissolve attachment,[1] but a judgment for the plaintiff which denies him the lien does dissolve the attachment as effectually as if the judgment were for the defendant. The forthcoming bond is thus cancelled just as unbonded attached property is thus released.[2]

The importance of the judicial recognition of the privilege is seen from the fact that the lien can only be perfected by the judgment, which has relation back to the levy.[3] Before maturity by judgment, the attaching creditor cannot assert his lien by an action to set aside an alleged fraudulent conveyance by the defendant.[4] It is, from the moment of confirmation by judgment, fully entitled to the weight of a perfect lien from the date of its creation as a hypothetical lien. In a contest for

[1] Dunn *v.* Crocker, 22 Ind. 324; Gass *v.* Williams, 46 Id. 253; Jager *v.* Stalting, 30 Id. 341; Bell *v.* Western etc. Co. 3 Met. (Ky.) 559; Hardcastle *v.* Hickman, 26 Mo. 475; Jones *v.* Jones, 38 Id. 429; Hagan *v.* Lucas, 10 Pet. 400; Kirk *v.* Morris, 40 Ala. 225; Woolfolk *v.* Ingram, 53 Id. 11.

[2] State *v.* Manly, 15 Ind. 8; Foster *v.* Dryfus, 16 Id. 158; Moore *v.* Jackson, 35 Id. 360; McCollem *v.* White, 23 Id. 43; Perkins *v.* Bragg, 29 Id. 507.

[3] Scarborough *v.* Malone, 67 Ala. 570; Tennant *v.* Battey, 18 Kan. 324; Coffin *v.* Ray, 1 Met. (Mass.) 212; McMechan *v.* Griffing, 3 Pick. 149; Tyrrell's Heirs *v.* Rountree, 7 Pet. 464; Goodwin *v.* Richardson, 11 Mass. 475; Cushing *v.* Hurd, 4 Pick. 253; Van Loan *v.* Kline, 10 Johns. 129; Penney *v.* Little, 3 Scam. 305.

[4] Tennant *v.* Battey, 18 Kan. 324.

priority, with other perfect liens, such as mortgages, it now is entitled to as much consideration as if it had been conventionally created.

On the other hand, should there be judgment rendered against the defendant without recognition of the lien and privilege upon the property attached; if the judgment should be such as to give the plaintiff no exclusive privilege to execute the attached property but should leave such property equally subject to execution by any other judgment creditor, the lien would be lost, and would be rendered abortive *ab initio.* But in determining whether a judgment recognizes the attaching-creditor's privilege on the property attached and completes his lien, we must not confine ourselves to the mere verbiage of the decree but to the meaning as understood in connection with the general practice of the State in which the judgment is rendered. Though purely personal in form, the decree may be operative against property in vindication of the attachment lien: as previously remarked, the judicial recognition of the lien may be understood. It is not deemed necessary to the maintenance of the lien, in several of the States, that its recognition should be written in the decree.

The attachment lien finally merges into the judgment lien which succeeds it; but if the judgment is personal only, with no privilege on the attached property judicially recognized and decreed, and none implied or understood, the attachment proceedings are rendered nugatory from the beginning.[1] It is as important that the lien be legally maintained by the proceedings subsequent to its creation, as that the statute requirements creating it should be observed in the first place.[2]

[1] Smith *v.* Scott, 86 Ind. 346; Lowry *v.* McGee, 75 Ind. 508. Held therein that no lien created by the issuing of an attachment, under the statute of Indiana on the subject, can exist or have any force after judgment has been rendered in a cause in aid of which it has been issued, "unless there is a special judgment or order of sale of the property attached and a special execution. 2 R. S. 1876, p. 111 § 188; The State *ex rel.* *v.* Manly, 15 Ind. 8; Foster *v.* Dryfus, 16 Ind. 158; McCollem *v.* White, 23 Ind. 43; Perkins *v.* Bragg, 29 Ind. 507; Moore *v.* Jackson, 35 Ind. 360; Gass *v.* Williams, 46 Ind. 253; Lowry *v.* Howard, 35 Ind. 170; Willets *v.* Ridgeway, 9 Ind. 367."

[2] The State, *ex rel.* *v.* Miller, 63

When, however, there has been judgment rendered formally against the defendant, with privilege upon the property attached, the issuing of a general execution instead of an order for the sale of the attached property, is not a waiver of the attachment lien nor of the priority acquired by attaching.[1] There would be a waiver, however, should property that had not been primarily attached, (but levied upon under the execution for the first time,) be seized and sold to the satisfaction of the judgment. Like any other lien,—like a mortgage, pledge or pawn,—it would die with the debt which had called it into existence.

There is nothing sacramental in the form of the judgment recognizing the privilege upon attached property. Total omission of any mention of such privilege is not necessarily a defeat of the lien and a dissolution of the attachment. As above mentioned, it is not deemed essential to the maintenance of the lien, in several of the States, that it be formally recognized.[2] The omission of formal recognition, in States where the law does render express judgment against property essential to the maintenance of the lien; or the express denial of privilege in the judgment, in the other States, would be fatal to the attachment, and equivalent to its judicial dissolution.

As it was remarked early in this treatise, the attachment suit is *always* personal in form. The judgment, though always personal in form, may be in effect against a thing. The effect may be such, whether the decree is, in form, simply against the defendant personally, or against him personally with privilege upon the property attached. The practice is not uniform as to the express recognition of the privilege in the decree, but it is so as to the intendment of the personal decree to be of effect against property, when such intendment appears.

When the final judgment is not meant to have any bearing on the attached property but to be entirely personal, it ought

Ind. 475; The Excelsior *etc.* Co. *v.* Lukens, 38 Ind. 438; Lowry *v.* McGee, 75 Ind. 508.

[1] Leibman *v.* Ashbacker, 36 Ohio St. 94.

[2] If the attachment is sustained and the attached property executed, sureties cannot complain that there was no special, express judgment against the property. Thole *v.* Watson, 6 Mo. App. 591.

not to be silent on the subject of the attachment: there should be an order of restoration included, if the property has not already been restored to the defendant upon dissolution of the attachment during the course of the proceedings.[1] If, during the progress of the proceedings, the *res* has been judicially awarded to an intervenor, the attachment suit against the defendant is ended, and only the personal one can be further prosecuted; and the whole case against him is terminated, if he has not been served with summons and has not appeared.[2] If the final judgment is for the defendant, there is no need of an order quashing the attachment.[3]

A personal judgment exceeding in amount the value of attached property appraised and bonded, cannot be recovered in full against the surety whose obligation is limited to the appraisement. It was held in Arkansas, (under the proviso of her attachment statute, that "no greater amount shall be recovered of the securities than the appraised value of the property seized by the officer,") that the court, on a verdict for a greater amount, should render judgment against the principal and sureties for the appraised value, and against the principal alone for the balance.[4] It had been held erroneous to include the surety with the defendant in the attachment judgment.[5]

The defendant can appeal only when judgment has been rendered against him on the merits; but the plaintiff may, when a plea in abatement has been decided adversely to him, in the attachment proceeding, though the judgment on the merits of the personal suit be in his favor.[6] Were this right denied the plaintiff, he would, in such case, be denied the benefit of his attachment lien though the judgment in the ancillary suit might be reversible; and he would have nothing but an ordinary personal judgment.

In Iowa, the judgment must be formally *in rem* when there has been publication but neither service nor appearance. Though

[1] Jackman *v.* Anderson, 33 Ark. 414.

[2] Ireland *v.* Webber, 27 Ind. 256; Jaffray *v.* Purtell, 66 Ga. 226.

[3] Higgins *v.* Grace, 59 Md. 365.

[4] Holmes *v.* Cooper, 27 Ark. 239.

[5] Mizell *v.* McDonald, 25 Ark. 38.

[6] Knapp *v.* Jay, 9 Mo. App. 47; Rancher *v.* McElhinney, 11 Mo. App. 434.

all the prior proceedings may have been in conformity to statute, and the property attached is the same as that sold under the judgment, yet if the decree, following the pleadings, is personal in form, it may be collaterally attacked.[1] Though all the previous proceedings in any case may be such as to enable the court to render a formal judgment against the attached property, yet if the decree is nominally against the defendant it is deemed absolutely void in that State, and a purchaser at the sale is liable to ejectment at the suit of the attachment debtor.

In Indiana it is held necessary that the attachment lien be recognized in the judgment; that this is as important as the observance of the statutory requisites for the creation of the liens; there must be a special judgment and special execution to enforce the lien.[2] There are other States than those specified which hold the same doctrine; but the general practice in others is to treat the judgment as following the previous proceedings, which, being *formally* against a personal defendant, (though *really* against his property when he has not appeared nor been served, but has only been notified by publication,) may be consummated by a judgment personal in form.

Sec. 15. Final Decree against the Garnishee.

Final judgment must be rendered against the defendant in an attachment suit, before the garnishee can be ordered to pay into

[1] Smith *v.* Griffin, 59 Iowa, 409, in exposition of § 2881 of the code, providing that in a proceeding by attachment, when the defendant has not been served with process, the judgment should be *in rem* only and not *in personam*. Griffin had sued Smith, attached land, notified him by publication, obtained judgment, and had become the purchaser at sale. Smith sued to recover the property and the court held the judgment absolutely void because of its form, adding: "the court might have rendered a judgment *in rem* but did not do so." Previous decisions are of like import: Wilkie *v.* Jones, Morris, 97; Doolittle *v.* Shelton, 1 G. Greene, 272; Johnson *v.* Dodge, 19 Ia. 107; Hakes *v.* Shupe, 27 Ia. 465; Lutz *v.* Kelley, 47 Ia. 307.

[2] Lowry *v.* McGee, 75 Ind. 510; State *v.* Miller, 63 Ind. 475; Gass *v.* Williams, 46 Ind. 253; The Excelsior &c. Co. *v.* Lukens, 38 Ind. 438; Lowry *v.* Howard, 35 Ind. 170; Moore *v.* Jackson, Id. 360; Perkins *v.* Bragg, 29 Id. 507; McCollem *v.* White, 23 Ind. 43; Foster *v.* Dryfus, 15 Ind. 158; State *v.* Manly, 16 Ind. 8; Willets *v.* Ridgway, 9 Ind. 367.

court or deliver property for execution.[1] Such judgment must have been signed and made of record before the auxiliary one can be rendered. Sufficient reason for judgment is the garnishee's admission direct or indirect, that he owes the defendant unconditionally, or that he holds property of the defendant liable to execution; or the garnishee's fraudulent evasion of interrogatories; or the proof *aliunde* of the fact of unconditional indebtedness to defendant or of possession of property liable to execution upon the plantiff's judgment.

Reasons for an order discharging the garnishee are his untraversed denial of indebtedness to defendant or possession of defendant's property, his candid statement of facts of such a character as to show no legal liability, his right to the benefit of a doubt, and the failure of the plaintiff to get judgment against the defendant.

The amount of the judgment against the garnishee cannot exceed the debt he owes or the value of the property he holds subject to execution for the defendant's debt. So far as concerns the property, its delivery to the sheriff when demanded is all that is required, so that there is no judgment for its value unless it should fail to be forthcoming when wanted. If he is in possession of more of defendant's property than is sufficient to satisfy the judgment, or owes him more, the surplus remains unaffected.

If the judgment against the defendant is greater in amount

[1] Withers *v.* Fuller, 30 Gratt. 547; Randolph *v.* Little, 62 Ala. 376; Lee *v.* Ryall, 68 Ala. 354; Case *v.* Moore, 21 Id. 758; Bostwick *v* Beach, 18 Id. 80; Lowry *v.* Clements, 9 Id. 422; Leigh *v.* Smith, 5 Id. 583; Gaines *v.* Bierne, 3 Id. 114; Toledo R. R. Co. *v.* Reynolds, 72 Ill. 487; Hinds *v.* Miller, 52 Miss. 485; Hoffman *v.* Simon, 52 Miss. 302; Murdock *v.* Daniel, 58 Miss. 411; Roberts *v.* Barry, 46 Id. 260; Metcalf *v.* Steele, Id. 511; Kellogg *v.* Freeman, 50 Id. 127; Erwin *v.* Heath, Id. 795; Lingardt *v.* Deitz, 30 Ark. 224; Collins *v.* Friend, 21 La. Ann. 7; Rose *v.* Whaley, 14 Id. 374; Proseus *v.* Mason, 12 La. 16; Caldwell *v.* Townsend, 5 Martin, N. S. 307; Clough *v.* Buck, 6 Neb. 343; Washburne *v.* New York &c. Co. 41 Vt. 50; Rowlett *v.* Lane, 43 Tex. 274; Bushnell *v.* Allen, 48 Wis. 460; Moore *v.* Allen, 55 Ga. 67; Bryan *v.* Dean, 63 Ga. 317; Housemans *v.* Heilbron, 23 Id. 186; Emanuel *v.* Smith, 38 Id. 602; Railroad *v.* Todd, 11 Heisk. 549; Langford *v.* Ottumwa Water Power Co. 53 Iowa, 415; Whorley *v.* M. & C. R. Co. 72 Ala. 20.

than the sum specified in the writ of garnishment, the judgment against the garnishee must be in accordance with the writ if the evidence will support it to that amount; it cannot be made to exceed the sum stated in the writ.[1] A stipulation, that if the court should find for the plaintiff, the judgment shall be for a stated sum, is no basis for determining the garnishee's indebtedness.[2]

There is no breach of the condition to pay in case of condemnation, after bonding, so far as the debt or property subjected to garnishment shall be found liable, until there has been judgment rendered in favor of the plaintiff, on the garnishment, finding the amount.[3]

A garnishee cannot object to irregularities in proceedings against the defendant, unless such as would make the judgment void.[4] Nor can he complain that the decree was without process, if the defendant has confessed service.[5] Nor can he have a judgment against himself set aside, on the ground that the evidence was insufficient, upon motion made after the term.[6] His remedy is by appeal or writ of error, according to the practice in his State. The garnishee should appeal from a judgment against him as acceptor of a draft or order, rendered in an attachment suit against the drawer, since he will remain liable to the holder of the draft.[7]

It has been held that a garnishee is not bound, in the absence of the defendant, to make objection to amendable defects appearing of record.[8] He should, however, claim for such absentee, the benefit of exemption, when property or a credit exempt by law has been attached or subjected to garnishment.[9]

[1] Hoffman *v.* Simon, 52 Miss. 302. This was garnishment in execution, which is held to be original process in Mississippi; but the principle is general that the garnishee cannot be held beyond the amount claimed of him, notwithstanding the greater demand against the defendant.

[2] Cairo & St. Louis R. R. Co. *v.* Killenburg, 92 Ill. 142.

[3] Moore *v.* Allen, 55 Ga. 67.

[4] Benson *v.* Hollaway, 59 Miss. 358.

[5] Sadler *v.* Prairie Lodge, 59 Miss. 572.

[6] Fort *v.* Stroheeker, 58 Ga. 262.

[7] Montague *v.* Myers, 11 Heisk. 539.

[8] Bushnell & Clark *v.* Allen, 48 Wis. 460. See Johann *v.* Rufener, 32 Wis. 195; Pierce *v.* Railway Co. 36 Wis. 283.

[9] Chicago & Alton R. R. Co. *v* Ragland, 84 Ill. 375.

In several of the States, debt either due to the defendant or becoming due, may be the subject of garnishment,[1] and where thus liable, the garnishee should disclose the fact that the debt is undue, if such is the case, but he is not bound to except to the suit for the protection of the absent defendant. Unliquidated damages are not garnishable;[2] and should one who has been sued for them be interrogated as garnishee, he might truly answer that he owes nothing; and that would acquit him of his duty to the absent attachment-defendant. He ought not have judgment entered against him as garnishee, in any case, unless he clearly was indebted to the defendant at the time he was garnished.[3] He cannot be put in a worse position than if sued by his own, immediate creditor.[4]

Garnisheed funds or debts should not be ordered to be paid into court prior to judgment against the defendant; and certainly not before, in any case, unless the attaching creditor has previously secured the garnishee by a bond. Such payment, if made prematurely, without bond, should be annulled, and the funds repaid to the garnishee, in case the creditor should fail in his suit against the defendant.[5] A different rule would subject the garnishee to double payment, since the defendant could recover of him after having gained the principal suit.

Even after final judgment against the defendant, the garnishee should not be subjected to a general order to pay the judgment and all the costs of the proceeding, though his answer may have shown that he has sufficient funds in his hands for the purpose; for he is entitled to have the specific sum, for which he is held, named in the order, so that he may readily show what amount of credit he will have in his account with the defendant. Such general judgment, however, may be made specific upon motion.[6] A judgment, in such round terms,

[1] Wilcus *v.* Kling, 87 Ill. 107.

[2] Gove *v.* Varrell, 58 N. H. 78.

[3] Cairo & St. Louis R. R. Co. *v.* Hindman, 85 Ill. 521.

[4] Carlos *v.* Alvord, 45 Ct. 569; Doyle *v.* Gray, 110 Mass. 206; Nutter *v.* Framingham & Lowell R. R. Co. and Trustee, 132 Mass. 427.

[5] So held in Mississippi where the creditor is required to give bond to the garnishee to secure payment before judgment. Murdock *v.* Daniel, 58 Miss. 411.

[6] Randolph *v.* Little, 62 Ala. 396.

could not be deemed informal nor vicious. It could hardly ever be accurate as to costs at that stage.

If the original attachment served upon the garnishee is void, the judgment against him thereunder is so, notwithstanding judgment obtained against the principal defendant.[1] On the other hand, if the defendant has not been notified of the attachment, either actually by service, or constructively by publication, any judgment against a garnishee in such attachment case would be void.[2] In all cases, if the judgment against the principal defendant is null, that against the garnishee is so;[3] but it has been held that though the former may have assigned the debt due him by the garnishee, the latter, if he has paid under a judgment, should be protected from a suit subsequently brought against him by the assignee; and that, too, even if he had had notice of the assignment after he was summoned and before the judgment.[4] If the judgment against the principal defendant is reversed on appeal, that against the garnishee falls with it; it becomes an absolute nullity.[5] Such would be the result, though the minor judgment be not mentioned in the decree of the appellate court, and though the garnishee be not before that tribunal either as appellant or appellee.

Proper names, as well as common, are only signs of ideas; and when there is certainty as to the person meant, an error in designating him by the sign which he has adopted or which was bestowed upon him by his parents, is not fatal, in attachment pleadings. A garnishee who has responded to a summons directed to him, though his right name was not in the direction, cannot, after judgment has been rendered against him in his right name, enjoin the execution on the ground of misnomer in the summons.[6] He might have moved to set aside the service of summons, before answering or submitting to a rule to answer.[7] Nor can the garnishee shield himself

[1] Greene *v.* Tripp, 11 R. I. 424.

[2] Railroad *v.* Todd, 11 Heisk. 549.

[3] Matheney *v.* Earl, 75 Ind. 531, and cases therein cited.

[4] Newman *v.* Manning, 79 Ind. 218.

[5] Clough *v.* Buck, 6 Neb. 343.

[6] Williams *v.* Hitzie, 83 Ind. 303.

[7] Balt. & O. R. R. Co. *v.* Taylor, 81 Ind. 24; Whitney *v.* Lehmer, 26 Ind. 503; Gould *v.* Meyer, 36 Ala. 565.

behind a mistake in the defendant's name, and pay over what he owes to him after having been summoned as garnishee. Even if the error existed at the time the summoned garnishee paid to the defendant, and its correction took place afterwards and no notice of the change from the wrong appellation to the right was given to the garnishee, still he would be responsible to the attaching creditor if the latter should show that the defendant was as well known by the one name as the other and that the garnishee knew who was meant by the designation employed.[1]

The garnishee has no right to object to the amendment of the plaintiff's affidavit and bond, so at to correct misnomers and like mistakes, if the defendant is in court.[2] When an attachment suit is brought by a firm, the partnership designation should be followed by a disclosure of the members' names. The omission of them is an error that may be amended.[3]

Errors and irregularities in the proceedings of an attachment suit, in which the court has jurisdiction, cannot be successfully set up by the garnishee to avoid a judgment against himself.[4] If the proceedings are not void but voidable, the defendant may reverse them upon appeal or writ of error as in other cases, but the garnishee is uninjured if he is made to pay to the attaching creditor, and the defendant acquiesces, however irregular such jurisdictional proceedings may be. The garnishee cannot assign as error mere irregularities in the judgment against the principal defendant, but he may assign whatever would make such judgment void.[5] He may have a judgment set aside as void, if entered against himself by the clerk without authority.[6]

A verdict and judgment against him, for a specific sum, in an attachment in execution, are erroneous.[7]

Should there be a joint judgment rendered against the defendant and the garnishee, the latter may have execution set aside,

[1] Balt. & O. R. R. Co. *v.* Taylor, 81 Ind. 24.

[2] Id.

[3] Barber *v.* Smith, 41 Mich. 138.

[4] Earl *v.* Matheney, 60 Ind. 202.

[5] Erwin *v.* Heath, 50 Miss. 795.

[6] Lee *v.* Carrollton Savings and Loan Association, 58 Md 301.

[7] Bonnaffon *v.* Thompson, 83 Pa. St. 460.

as to himself, by means of *certiorari*. He cannot be lawfully made a general defendant so as to have his own property subjected to execution for another's debt.[1] The execution against him, when a judgment is not joint, ought to show that it is limited to the sum which he has been ordered to pay into court. Should the officer executing the writ, collect more, he ought to return the surplus to the garnishee.[2] To condemn the debtor's debtor as though there were solidarity of indebtedness to the attaching creditor, is wholly unjust and unwarrantable.

Indeed, the judgment against the garnishee is rather in favor of the principal defendant than against him. It is really a judgment in favor of the defendant in the attachment suit, for the use of the plaintiff therein.[3]

When judgment has been rendered against a garnishee prematurely, before any has been decreed against the defendant, it should be set aside upon proper application.[4] It may be set aside on other grounds, or its execution enjoined. If the garnishee shows that, without *laches* on his part, he was prevented from a timely appearance, and that he could have set up a good defense, and that the collection of the amount he has been ordered to pay would work him injury and injustice, the court may give him relief. Especially if he can show that he was prevented from making a timely defense by the fraud of the plaintiff, will he be entitled to have the order set aside. Unavoidable accident too, may, in the discretion of the court, be deemed sufficient ground for vacating the order, and allowing the garnishee to make answer or set up defense.[5] He was denied relief, however, in one instance, after having sworn to answers written out for him, at his request, (by the clerk, who left out part of what he had been directed to write,) though he

[1] Masters *v.* Turner, 10 Phila. 482.

[2] *Ib.*

[3] In Illinois, the judgment is in favor of the defendant for the use of the plaintiff, when rendered against a garnishee in an attachment suit; and any balance beyond what is necessary to satisfy the attaching creditor, remains for the benefit of the attachment-debtor. Webster *v.* Steele, 75 Ill. 544; Chic. & Rock Is. R. R. Co. *v.* Mason, 11 Ill. App. 525.

[4] Bryan *v.* Dean, 63 Ga. 317.

[5] Freeman *v.* Miller, 53 Tex. 572.

supposed the answer complete when he signed it and swore to it.[1]

Sec. 16. Garnishee Protected by Judgment.

The garnishee may plead payment under judicial order, against any subsequent suit against him by his former creditor, in bar of the action. He may plead garnishment in abatement, when he has been served but has not yet paid—the attachment proceedings being still pending, or his judicial requirement to pay into court being still uncertain. Such plea in abatement should not operate the discontinuance of the suit, but either a delay of the trial or a suspension of the judgment. The debt exists, payable to somebody; and it is immaterial to the debtor-garnishee to whom he pays, provided he gets acquittance. If afterwards sued by his own, immediate creditor, (or him who was such before the subrogation by the attachment and garnishment judgments,) he may successfully plead that he has had judgment against him as garnishee, and paid the same indebtedness thereunder. If served with process of garnishment, then sued by the attachment-defendant, and judgment be rendered against him, then condemned in the garnishment proceeding, if he pay into court as garnishee he must look to an equity court for relief from the judgment obtained against him by the attachment-defendant.[2] If he has paid part of his acknowledged indebtedness under an order against him as garnishee, and has tendered the balance to an officer executing a judgment of the defendant against him, the court will have the writ recalled and the credit allowed.[3]

The garnishee may defend against a suit by his former creditor and set up that he has already paid under an order of court in attachment proceedings,[4] because judgment against the defendant in attachment must necessarily have preceded that against the garnishee, and the effect of such judgment against the

[1] Lawton *v.* Branch, 62 Ga. 350.

[2] Allen *v.* Watt, 79 Ill. 284. In Tennessee, he has an action at law to protect himself against an erroneous judgment in favor of the garnishor: Carroll *v.* Parkes, 57 Tenn. 269.

[3] Sandburg *v.* Papineau, 81 Ill. 446. See Collins *v.* Jennings, 42 Iowa, 447.

[4] Canaday *v.* Detrick, 63 Ind. 485.

attachment-defendant was to transfer the debt of the garnishee from that defendant to the attaching creditor by operation of law.[1] But, while the garnishee may plead judgment, it has been held that he cannot plead in bar the pendency of garnishment proceedings against him, in defense of a suit brought by his immediate creditor—the defendant in the attachment suit.[2] The reason why judgment against him may be pleaded, and why it will protect him, is that garnishment operates as an assignment to the attaching creditor.[3] As the discharge of the garnishee does not thus operate, and as it is no adjudication of non-indebtedness to the defendant that will preclude the latter, it cannot be pleaded, either in abatement or in bar, to a subsequent suit brought by the attachment-defendant.[4]

When garnishment has been dissolved, and the plaintiff has appealed, and the defendant has sued the garnishee for what was attached in the latter's hands, the court will not order a stay of proceedings in such suit, to await the result of the appeal in the attachment suit; for should there be judgment, the garnishee's payment thereon would protect him from the garnishment though the previous decree dissolving it should afterwards be reversed.[5] A garnishee, however, is not finally discharged by the dissolution of the garnishment, if the plaintiff appeal, but must await the ultimate result of the litigation.[6] Payment to the defendant after appeal is void as to the plaintiff.[7]

It has been held that one sued in a State court cannot plead in defense his own garnishment in a federal court.[8] If, however, there has been final judgment against him in the garnishment proceeding, and he has had acquittance by payment, he should be allowed to plead it anywhere.

[1] Kellagg *v.* Freeman, 50 Miss. 157.

[2] Shealy *v.* Toole, 56 Ga. 210.

[3] Campbell *v.* Nesbitt, 7 Neb. 300.

[4] Ruff *v.* Ruff, 85 Pa. St. 333.

[5] Montgomery Gas Light Co. *v.* Merrick, 61 Ala. 534.

[6] Having admitted the possession of notes belonging to the defendant to the amount of $2000, the garnishee was ordered to retain $475 of his future collections thereon to meet the attaching creditor's claim and costs, in case there should be judgment against the defendant. There was judgment for the defendant, from which the plaintiff appealed. It was held that the garnishee was not discharged but that he could not be made to pay till the conversion of the assets. Delby *v.* Tingley, 9 Neb. 412.

[7] Puff *v.* Hutcher, 78 Ky. 146.

[8] McRee *v.* Brown, 45 Tex. 503.

An order of court that the garnishee pay into court the sum attached in his hands, cannot be collaterally attacked,[1] if the court have jurisdiction so to order, provided there has been no appeal and the judgment is final. But if the judgment is void for want of jurisdiction, the garnishee who had paid under order of court may be adjudged to pay again in a suit by his credtor.[2] Obviously, the decree may be attacked for fraud, collusion or want of jurisdiction, but not for mere irregularities in the exercise of jurisdiction.[3]

The general rule is that a garnishee is protected by the judgment, notwithstanding error and irregularity in the proceedings.[4]

Failure by the garnishee to disclose the fact that the goods in his hands are subject to a chattel mortgage, resulting in judgment against him in an attachment proceeding, will leave him liable to a suit by the mortgagee.[5] The answer should disclose the fact of the existence of the mortgage, when within his knowledge. so as to entitle him to a discharge from the garnishment. He would remain liable to the defendant if he knew, but did not disclose, that the funds in his hands were exempt from garnishment.[6]

Sec. 17. Execution.

Judgment with privilege upon the property attached and in court should not be followed by a writ of *fieri facias;* for there is nothing to be seized or levied upon:[7]—the *res* being already in court actually or constructively; that is, in the sheriff's hands or in those of a keeper, receiptor, or the defendant holding under a forthcoming bond, or whomsoever has the subordinate

[1] Wilson *v.* Burney, 8 Neb. 39; Gray *v* Del & Hud. Canal Co. 5 Abb. N. Cas. 131.

[2] Laidlaw *v.* Morrow, 44 Mich. 547; Holland *v.* Smit, 11 Mo. App. 6; Branahl *v.* Watson, Id. 587.

[3] Rudolph *v.* McDonald, 6 Neb. 163.

[4] Oppenheim *v.* Pittsburg, Cin. &c. R. R. Co. 85 Ind. 471; Woods *v.* Milford Savings Inst. 58 N. H. 184; Cottle *v.* Am. Screw Co. 13 R. I. 627; Howard *v.* McLaughlin, 98 Pa. St. 440; McDonald *v.* Simcox, Id. 619.

[5] Smith *v.* Ainscow, 11 Neb. 476. See Flanagan *v.* Cutler, 121 Mass. 96.

[6] Smith *v.* Dickson, 58 Iowa, 444. See Field *v.* McKinney, 60 Miss. 763.

[7] Wyman *v.* Russell, 4 Biss. 307.

possession. That writ may be employed if the property has been taken out of the control of the court by means of a dissolution bond; and also when the judgment is merely personal, giving no privilege upon the attached fund, debt or property, or giving it when the *res* is inadequate; but manifestly there can be no re-taking by the sheriff for the plaintiff when he is already in possession under the attachment writ. The attachment having been made as a preliminary to execution, to conserve the property for that very purpose, the writ of *fieri facias* is inapplicable after judgment sustaining the attachment, so far as such property is concerned.

The proper writ is *venditioni exponas.* The officer is commanded to expose to sale what he has already under seizure. If he has entrusted the attached property to others, under bond or otherwise, in any legal way, he must first regain the actual custody; and then he must offer it to the public in market overt, under such writ.

If the judgment is, in effect, only *in rem;* that is, if the defendant was not served and not in court, execution can be directed against only the property attached and held, whether it prove sufficient to satisfy the judgment or not, since such judgment is inoperative beyond the value of the *res:* hence, in such case, nothing remains to be done but expose to sale what has been attached.

The writs of attachment and *vend. ex.* together constitute all that is embraced in the *fi. fa.* Together, they are as though a *fi. fa.* had been issued when the writ of attachment was issued, if that could then have been legally done. In other words, the execution is retroactive in its effect, relating back to the levy made in the incipiency of the suit; and it is as effective against all levies subsequent to that time, and all liens since created, as any *fi. fa.* is from the date of seizure thereunder. The lien hypothetically created by the attachment levy, having now been perfected by judgment, may be vindicated by the execution of the property attached, as though it had been, all along, from its incipiency, a complete lien.[1]

[1] Porter *v.* Pico, 55 Cal. 165; Tyrrel's Heirs *v.* Rountree, 7 Peters, 464; Wallace *v.* McConnell, 13 Pet. 151; Van Loan *v.* Kline, 10 Johns. 129;

The execution, though always directed against the attached property when it is to vindicate a judicially recognized attachment lien, can only have binding effect so far as the *res* really belongs to the defendant. In other words, only the defendant's interest has been validly attached, can have been validly condemned to pay the debt, and can now be validly sold so as to convey a good, unimpeachable, indefeasible title to the purchaser.[1] Nobody but the defendant has been summoned or notified by publication; the writ has had reference to no property but his; jurisdiction has been over only him and his; the suit has been limited to his interest as the *res* proceeded against; the decree cannot possibly divest the interests of those who have not been notified or impleaded; nothing but what belongs to the judgment debtor can be executed to pay his debt; and, if the property exposed to sale by the sheriff as that of the defendant is really such, and the court has had jurisdiction over it, and has exercised it without excess, and no fraud has vitiated the proceedings, decree or sale, the purchaser buys as though purchasing of the defendant himself.[2]

Partnership property is not only liable to be levied upon for a partnership debt but also for that of a member of the firm. In the latter case, sale of goods may be prevented that the interest of the indebted partner may be ascertained, which is his share of the surplus after all the liabilities of the firm have

Goodwin *v.* Richardson, 11 Mass. 475; Coffin *v.* Ray, 1 Met. 212; Pierson *v.* Robb. 3 Scam. 143; Penny *v.* Little, 3 Scam. 305; Welch *v.* Joy, 13 Pick. 477; Martin *v.* Dryden, 6 Ill. 187; Cushing *v.* Hurd, 4 Pick. 253; Sigourney *v.* Larned, 10 Pick. 72; McMechan *v.* Griffing, 3 Id. 149; Warden *v.* Adams, 15 Mass. 233; Porter *v.* Millett, 9 Id. 101; Jackson *v.* Chamberlain, 8 Wend. 620.

[1] De Celis *v.* Porter, 59 Cal. 464; Hoag *v.* Howard, 55 Cal. 564; Pixley *v.* Hoggins, 15 Cal. 131; Purdy *v.* Irwin, 18 Id. 350; Hunter *v.* Martin, 12 Id. 377; Plant *v.* Smythe, 45 Id. 162; Wilcoxen *v.* Miller, 49 Id. 195; Ledyard *v.* Butler, 9 Paige, 132; Ells *v.* Tousley, 1 Paige, 283; Arnold *v.* Patrick, 6 Id. 315; Lounsbury *v.* Purdy, 11 Barb. 494; Averill *v.* Loucks, 6 Id. 26; Thompson *v.* Baker, 74 Me. 48; Hurst *v.* Hurst, 2 Wash. C. C. 78; Finch *v.* Earl of Winchelsea, 1 P. Williams, 278.

[2] Evans *v.* McGlasson, 18 Ia. 150; Orth *v.* Jennings, 8 Blackf. 420; Runyan *v.* McClellan, 24 Ind. 165; Pixley *v.* Huggins, 15 Cal. 133; Dodge *v.* Walley, 22 Id. 224; McDonald *v.* Badger, 23 Id. 399; Blood *v.* Light, 38 Id. 653.

been extinguished. Should the creditor insist upon the sale of partnership goods to satisfy his execution against the indebted partner, he may be restrained by injunction. Resort may be had to a court of equity for the adjustment of the partnership affairs and the ascertainment of the judgment-debtor's interest subject to execution; and another of the partners is competent to invoke the aid of such court for that purpose. Should the interest of the indebted property not be thus ascertained before the execution sale, so that it would be sold subject to subsequent ascertainment, the purchaser would become a tenant in common with the remaining partner or partners.[1] And the same rule applies to joint owners and tenants in common.[2]

Though the proper and most seasonable time for claiming exemption is when the sheriff is about to attach;[3] and though it logically should be at least before judgment, when the debtor is in court, lest he be deemed to have waived it,[4] yet in some States it may be claimed under such circumstances between judgment and sale—as in Ohio.[5] If exemption has been pleaded on the trial and the attachment has been sustained,

[1] Place *v.* Sweetzer *et al.* 16 Ohio, 143; Newhall *v.* Buckingham, 14 Ill. 405; White *v.* Jones, 38 Ill. 159, 166; Phillips *v.* Cook, 24 Wend. 389; Scrugham *v.* Caster, 12 Id. 131; Washburn *v.* Bank of Bellows' Falls, 19 Vt. 278; Bardwell *v.* Perry, Id. 293; Burgess *v.* Atkins, 3 Black. 337; Moore *v.* Kample, 3 Ala. 337; Shaver *v.* White, 6 Munf. 110; White *v.* Woodward, 8 B. Mon. 484; Hershfield *v.* Claflin, 25 Kan. 166; People's Bank *v.* Shryock, 48 Md. 427; Douglass *v.* Winslow, 20 Me. 89; Tredwell *v.* Roscoe, 3 Dev. 50; Schatgill *v.* Bolton, 5 McCord, 478; Weaver *v.* Ashcroft, 50 Tex. 428; Saunders *v.* Bartlett, 12 Heisk. 316; Marston *v.* Dewberry, 21 La. Ann. 518; Choppin *v.* Wilson, 27 Id. 444; U. S. *v.* Williams, 4 McLean, 236; Gilmore *v.* N. Am. Sand Co. Peters C. C. 460; Buckhurst *v.* Clinkard, 1 Shower, 173; Pope *v.* Haman, Comb. 217; Parker *v.* Pistor, 3 Bos. & Pull. 288; Johnson *v.* Evans, 7 Mann. & Grang. 240; Story on Part. § 261, 264; Gow on Part. § 206; Collyer on Part. § 822. *Contra:* Morrison *v.* Blodgett, 8 N. H. 238; Deal *v.* Bogue, 20 Pa. St. 228, 233.

[2] James *v.* Stratton *et al.* 32 Ill. 202; Millville *v.* Brown, 15 Mass. 82; Reed *v.* Howard, 2 Met. (Mass.) 36; Waddell *v.* Cook, 2 Hill, 47; Blevins *v.* Baker, 11 Iredell, 291.

[3] Sears *v.* Hanks, 14 Ohio St. 298; Frost *v.* Shaw, 3 Id. 270.

[4] Butt *v* Green, 29 Ohio St. 667; Dow *v.* Cheney, 103 Mass. 181; Smith *v.* Chadwick, 51 Me. 515; Bell *v.* Davis, 42 Ala. 460; Huswell *v.* Parsons, 15 Cal. 266; *ante* p. 166.

[5] Close *v.* Sinclair, 38 Ohio St. 530; Haas *v.* Shaw, 91 Ind. 384.

there is adjudication against exemption so that it cannot be afterwards set up to defeat the execution.[1]

Sec. 18. Garnishment in Execution.

The effect of an order of court directing that the garnishee in execution shall pay into court the money which he admits to be due the defendant is to subject such sum to the satisfaction of the attaching creditor's judgment. In such case, the third person suffers no wrong. But in case he should deny indebtedness, he could not be lawfully ordered to pay anything into court, unless his denial has been overborne by counter testimony. In order to such result, there would be necessity for a trial; and, in such case, the third person denying indebtedness ought to have as much latitude of defense as he would have in a suit by the defendant in the attachment suit brought directly against him. Should such ancillary suit be allowed? Its allowance is not universal,[2] and when it is permissible the tendency is to confuse the subordinate with the principal issue.

A garnishee in execution, denying indebtedness, cannot be compelled to pay, unless the plaintiff institutes action and gets judgment against him.[3] There should be simply an order to pay—not a general personal judgment.[4]

When an execution has been returned *nulla bona*, the attachment is abandoned.[5] It is equivalent to a return that no attachment has ever existed, since there could have been none if no property is found for it to rest upon. True, goods may have been attached but destroyed before time for execution. If,

[1] Perkins *v.* Bragg, 29 Ind. 507; State *v.* Manly, 15 Ind. 8.

[2] In Kansas, where the garnishee in execution denies indebtedness, he cannot be subjected to trial, judgment and execution in the attachment proceeding, but the attaching creditor can subject to execution what the garnishee owes to defendant only by a direct suit against the garnishee. Board of Education *v.* Scoville, 13 Kan. 32; Arthur *v.* Hale, 6 Id. 165; Atlantic and Pacific R. R. Co. *v.* Hopkins, 94 U. S. 11. In Georgia, the plaintiff in an ejectment suit may have process of garnishment in aid of his count for mesne profits. Walker *v.* Zorn, 56 Ga. 35.

[3] Hartman *v.* Olvera, 51 Cal. 501. See Wolff *v.* Bank of Commerce, 10 Mo. App. 586.

[4] Clark *v.* Foxworthy, 14 Neb. 241.

[5] Butler *v.* White, 25 Minn. 432.

for any reason, no lien has been perfected by judgment, the attachment suit is at an end. But if a valid personal judgment has been rendered, it may be executed like any other personal decree; and, to this end, a debtor of the judgment defendant may be garnished at this stage, and service may be had upon him anywhere in the State.[1] It is like the summons of a witness, which may be served in any county.

If the defendant has satisfied the judgment, that fact may be pleaded successfully by the garnishee in execution.[2] The dissolution of the attachment, or the completion of the execution, or anything that terminates the plaintiff's proceedings against the defendant when not personally bound, may be set up by the garnishee as a discharge of himself.[3] The garnishee in execution may plead want of service upon the principal defendant.[4]

A judgment creditor, by garnishing the officers of a railroad company, may subject to execution the nett income of the road between the date of a mortgage foreclosure and that of the appointment of a receiver, if the decree of foreclosure is silent as to such income, and if the road is run by the company during the interval mentioned, if the trustees under the mortgage never had possession nor claimed the income.[5] A co-defendant, after judgment *in solido*, cannot be garnished in execution; an exception to such garnishment should be sustained.[6] The proper course is to issue a direct execution against the property of either of the judgment-debtors. It has been held that choses in action cannot be reached by garnishment in execution.[7]

If a judgment debtor suffers property or credits of his to be subjected to garnishment, making no exception or objection

[1] Toledo R. R. Co. *v.* Reynolds, 72 Ill. 487. But see Marqueze *v.* Le Blanc, 29 La. Ann. 194.

[2] Hammett *v.* Morris, 55 Ga. 644; Thompson *v.* Wallace, 3 Ala. 132; Price *v.* Higgins, 1 Littell, 274.

[3] Mitchell *v.* Watson, 9 Fla. 160; Ridlon *v.* Cressey, 65 Me. 128; McEachin *v.* Reid, 40 Ala. 410.

[4] Cota *v.* Ross, 66 Me. 161.

[5] Gilman *v.* Ill. & Miss. Tel. Co. 1 McCrary, C. C. 170; Miss. R. R. Co. *v.* U. S. Express Co. 81 Ill. 534.

[6] Baily *v.* Lacey, 27 La. Ann. 39; Richardson *v.* Lacey, Id. 62.

[7] Gilmore *v.* Carnahan, 81 Pa. St. 217.

till the garnishee has been condemned to pay or deliver for execution, his right of exemption is lost.[1]

In Iowa, exemption from garnishment by the laws of another State cannot be pleaded unless the amount due by the garnishee is also exempt by the laws of Iowa.[2] So in West Virginia.[3]

The practice of examining garnishees after an unsatisfactory answer, under an order of court or under statutory authority, after judgment against the defendant, is similar to that of examining them before judgment. It is therefore unnecessary to repeat what was said in the chapter on charging the garnishee, on that particular subject.

The position of the garnishee being that of a party to a side issue—not that of a witness in the main case—a wife, who has denied indebtedness to her husband in reply to statutory interrogatories, may be further examined with the view of charging her as garnishee in a suit against him. While she could not be made a witness against him, she may be examined in the capacity of garnishee though the result be her condemnation to pay into court what she owes him, or deliver what property of his she holds, in aid of the plaintiff's writ of execution.

Could she shield herself from further examination after having denied liability in answering the statutory questions, she might thus interpose the sanctity of the marital relation to the defeat of the ends of justice. Her husband, being already adjudged the debtor of the plaintiff, should in good conscience permit the execution of the judgment against any property or credit of his not exempt from execution. His wife, by failing to disclose any such property in her possession or credit due him from her, would not be in the position of one refusing to testify in a cause pending against her husband but in that of one impeding the execution of a judgment already obtained.

Upon refusal to answer further question duly propounded, a wife may be charged as garnishee in execution of a judgment rendered against her husband, just as any other garnishee may

[1] Randolph *v.* Little, 62 Ala. 396, overruling Webb *v.* Edwards, 46 Id. 16.

[2] Leiber *v.* Union Pac. R. R. Co. 49 Iowa, 688.

[3] Stevens *v.* Brown, 20 W. Va. 451.

be charged on refusal; but if, instead of insisting upon an order so charging, the plaintiff should cite the garnishee to re-appear for another examination, he would be understood to waive his right to have her charged upon her first refusal.[1] Such waiver would be implied in the case of any garnishee.

Sec. 19. Concursus.

One of several attaching creditors, after each has, in a separate proceeding, obtained judgment against the common debtor, may sue all the others to have his right of priority adjudged contradictorily with them.[2] However brought into contact with each other, under the varying practice of the different States, the rival creditors must have the opportunity afforded of presenting their several judgments so as to have their respective liens marshalled according to rank. There must be a *concursus* of creditors, or something equivalent, so that all questions concerning their respective claims to priority over others may be contradictorily considered and finally determined.[3]

The principal question, in such a concursus, generally is that concerning the date of the attachment. Where the act of attaching is the creation of the lien, as in most of the States;

[1] Thompson *v.* Silvers, 59 Iowa, 670, in exposition of § 2984 of the Iowa Code, (See McClain's Stat.) providing that if the garnishee fail to appear and answer the interrogatories, without sufficient excuse, he shall be presumed to be indebted to the defendant to the full amount of the plaintiff's demands. In this case, the garnishee appeared but failed to answer the additional interrogatories on the grounds that she had already answered the statutory questions and that she could not be required to testify against her husband, the judgment-debtor. The lower court having sustained these grounds, the appellate court remanded the case and required her to answer. The reasoning on the wife's position as garnishee, distinguishing it from that of a witness against her husband, seems to be of general application.

[2] In Ohio, it may be by an original petition in the nature of a creditor's bill, making all parties defendants who claim liens on the fund attached; and to this, the other judgment creditors or professed lien-holders may file answers and cross-petitions, etc. Seibert *v* Switzer, 35 Ohio St. 662.

[3] Lexington and Big Sandy R. R. Co. *v.* Ford Place Glass Co. 84 Ind. 516; Davis *v.* Friedlander, 104 U. S. 570.

and where the first attacher has priority as is almost universally the case,[1] the precise time when the act was performed becomes very important. If the property attached is sufficient in value to pay only the first attacher, the date of seizing becomes all important.

The contest among creditors frequently, and indeed, usually takes place after the proceeds of the attached property have been brought into court. If the creditor who has caused execution to issue upon his judgment, and sale to be made, is really outranked by another attachment creditor, or by the holder of a recorded, pre-existing, perfect lien, he will have to give way to the one having the higher privilege; and his judgment must look to the residue after the first lien has been satisfied. The question between rival claimants for the proceeds is settled by the judgment of distribution. It is almost always after the proceeds are in court that the mortgagee appears to claim his prior right to payment. The attachment is necessarily subject to, and under the mortgage, since the interest of the attachment defendant is all that could be validly attached.

If the defendant appears to object to the confirmation of sale, he waives defects in the publication notice.[2] If he has been fraudulently summoned, he may keep out of court, and the proceedings will be void;[3] but, for amendable defects in the attachment writ and bond, the execution cannot be quashed after judgment at the instance of one duly summoned or notified.[4]

[1] Allen *v.* Gilliland, 6 B. J. Lea, 626; Moore *v.* Fedewa, 13 Neb. 379; Wright *v.* Smith, 11 Neb. 341; Adler *v.* Roth, 2 McCrary, 445, (in which it was held that if there is an attachment in a federal court and another in a State court, the first made has the priority of lien;) McBride *v.* Harn, 48 Iowa, 151; Crowninshield *v.* Strobel, 2 Brev. 80; Robertson *v.* Forrest, Id. 466; Bethune *v.* Gibson, Id. 501; Williamson *v.* Bowie, 6 Munf. 176.

[2] Helmer *v.* Rehm, 14 Neb. 219.

[3] Duringer *v.* Moschino, 93 Ind. 495.

[4] Miller *v.* Whitehead, 66 Ga. 283; Steers *v.* Morgan, Id. 552.

CHAPTER XVI.

SUITS RESULTANT FROM ATTACHMENT.

§ 1. Ejectment.
2. Ejectment: Judgment-Creditors' Sales as to Warranty.
3. Ejectment: Judgment-Owners' Sales as to Warranty; Difference between them and Attachment Sales.
4. Ejectment: Attachment Debtors' Sales before Amendment of Radical Defects.
§ 5. Bond Suits against Attaching Officers.
6. Replevin Suits against Attaching Officers.
7. Subsequent Suits against Garnishees.
8. Suits between Various Parties.

Sec. 1. Ejectment.

It is not proposed to trespass upon the grounds of writers on the general subject of Ejectment, nor even to make a *resumè* of the remarks interspersed through the previous chapters of this work on the essentials of a valid attachment judgment susceptible of withstanding every collateral attack. It is proposed however to consider some important matters appertaining to suits against purchasers at attachment sales—matters without the treatment of which the work would not seem complete.

When all the proceedings including the sale are in accordance with statute and the general law applicable, the purchaser obtains a title perfect as to the parties and their privies in the attachment suit. His title is also good against the notified debtor-owner of legally condemned property who did not take the position of a party-defendant in the case; and good against such debtor's privies. As to all these, the attachment judgment is *res judicata*, and therefore they cannot attack it collaterally.

The purchaser must look to the jurisdiction, if he would be secure as a bidder at the sale. He need not concern himself

about the erroneous exercise of jurisdiction by the court, when the judgment is final. The rule is comprehensively and yet succinctly stated by the Supreme Court of the United States: "The doctrine of this court and of all the courts of this country is firmly established, that if the court in which the proceedings took place had jurisdiction to render the judgment it did, no error in its proceedings which did not affect the jurisdiction will render the proceedings void; nor can error be considered when the judgment is brought collaterally into question."[1]

This settled doctrine renders it necessary that the purchaser, for his own safety, should first find that the court had *jurisdiction-to-render-judgment*—not merely authority to issue process, to maintain custody of attached property, to convert perishable things to cash, and the like. The Supreme Court did not say, in the foregoing extract, that any less jurisdiction than that to render judgment would protect the decree from assailability for errors committed in the unwarrantable assumption and exercise of it.

With this rule to guide him, the purchaser must look to the statute which conferred the special "jurisdiction to render the judgment" and see whether all the conditions precedent have been observed. If any one has been disregarded, he will purchase at his peril. He cannot safely rely upon decisions based on other statutes, with reference to errors, but he must see what the statute, governing the judgment under which he proposes to buy, requires to be done before such jurisdiction can be exercised.[2]

[1] McGoon *v.* Scales, 9 Wall. 30, reasserted in White *v.* Crow, 110 U. S. 189.

[2] In Tilton *v.* Cofield, 93 U. S. 165, the court cited Voorhies *v.* Bank of U. S., 10 Pet. 449, in which jurisdiction had been sustained though (1) "no affidavit as required by statute was found filed with the clerk, and the law provided that if this was not done the writ should be quashed on motion;" (2.) no notice was given or none appeared of record; (3.) default, required by statute, was not made; (4) the required delay of twelve months before sale was disregarded. Of this case it is said in Tilton *v.* Cofield: "The court there [the trial court] being competent to take jurisdiction, and having acquired jurisdiction by the seizure of the property, this court held that all its acts and orders made during the progress of the case were beyond the reach of collateral inquiry and could be assailed only in a direct proceed-

While errors in the exercise of lawful jurisdiction to render the judgment cannot be investigated in a collateral inquiry, the jurisdiction itself can be. Usurpation of wrongful power is not sacramental and inviolable. A court's decision in favor of its own authority may be collaterally disregarded. A jurisdictionless judgment is entitled to no faith and credit either in the State where it was rendered or in any other. The action of a court of general jurisdiction cannot be investigated in a State other than that in which it was had except for the purpose of testing the judicial right of action.[1]

Were the highest tribunal of the country to render a jurisdictionless judgment, the decision would not be authoritative. It would not be binding as a precedent upon that court or any other. Should it exercise judicial authority in any case after its jurisdiction thereof had been exhausted; or assume special jurisdiction—such as that in all attachment cases—when none had been statutorily conferred; or trespass beyond the bounds of the special power legislatively granted in such cases, its deliverances would be *coram non judice*. They would therefore be void as authority though binding on the litigants *ex necessitate rei*, since there would be no means of relief. The mandate to the lower court would be obeyed in any such case, but the opinion delivered would not be law.

The collateral assailant can take no advantage by reason of the want of jurisdiction in an ancillary proceeding when there has been a judgment rendered against the defendant which is personal in effect as well as form by a court possessed of jurisdic-

ing had for that purpose before a competent tribunal." Let the purchaser be sure that the statutory authorization of jurisdiction in the State where he bids, allows such errors to be committed without fatality when only custodial jurisdiction has been acquired. See *Statutory Requisites Jurisdictional*, *ante* pp. 321–328 and the authorities there cited.

[1] Gilchrist *v.* West Virginia Oil and Oil Land Co. 21 W. Va. 115; 45 Am. Rep. 555: The plaintiff sued on a New York judgment and attached property in West Virginia, but that judgment was held void because notice was by publication only and no property had been attached in New York—so neither the debtor nor his property had been reached there. See *ante*, Ch. X, Sec. 6, TERRITORIAL LIMITS, and the authorities there cited.

tion to render such personal judgment though not to decree privilege upon the property; and when the sale was made in execution of such personal judgment. A rival attacher in strictly statutory proceedings may indeed assert any attachment lien he may have acquired upon property sought to be executed in effectuating the personal judgment; he may even follow such property when it is in the hands of the purchaser under the personal judgment; but his position is precisely like that of any lien-holder who was not a party to the suit. To make the matter plain—if the property, (bought under a personal judgment, good though the attachment proceedings were null,) belonged to the defendant and was unincumbered, the purchaser's title is good and cannot be impugned by the defendant or his privies because statutory requisites have been disregarded in an accompanying attachment proceeding which proved void for want of them.

A stranger to a jurisdictional judgment and sale, claiming to be the owner of the property sold as that of the attachment-defendant, may sue the purchaser and have him ejected. This is so because attachment proceedings are limited in their effect to the proprietary right of the defendant. The distinction pointed out in the first chapter, (and which has interlarded all the succeeding ones,) between proceedings against property of limited, and those of general, character must now appear of great practical importance. The former conclude the defendant and his privies; the latter conclude all the world, since "all the world are parties" as it is often said, though "there are no parties defendant" as it is said as frequently—the legal paradox being readily apprehended.

No one can sue a purchaser for property bought at a valid sale, which had been condemned under general proceedings against it, without becoming a collateral assailant of the judgment of condemnation; and, as such, he must prove fraud or want of jurisdiction before he can maintain his action; for the general notice made it obligatory upon him to appear as claimant to assert any right he had *in* or *to* the *res* proceeded against; and a failure thus to appear rendered him powerless ever to sue thereafter, if the proceeding was free from fraud and by a court

possessed of power to hear and determine the cause. He is precisely in the position of a judgment defendant in an attachment case who should attempt to assail the judgment rendered against him personally.

On the other hand, one not a party to a limited proceeding against property, (such as attachment is,) is not a collateral assailant of the judgment when he sues the purchaser who bought under the judgment. He is not concluded. He may freely admit the jurisdiction of the court and the compliance with all statutory requisites, yet aver that the property seized and sold was his own.

The purchaser at an attachment sale should therefore not only see that the court had jurisdiction and thus know that he will be protected from attack by the defendant, but he should also see that the title he proposes to buy was really in the defendant. And, since he buys subject to any lien or mortgage resting on the property, he should temper his bid accordingly. He must learn of the title and the incumbrances from the public records, for the attachment proceedings will not necessarily disclose them to him. He must learn as best he may that the personal property he buys belonged to the defendant. Many of the suits to eject purchasers of property at attachment sales are instituted by owners or mortgagees who were strangers to the proceedings under which the property was sold.

Sec. 2. Ejectment: Judgment-Creditors' Sales as to Warranty.

There is no warranty of the title. The judicial sale is provoked by a creditor; it is strictly a creditor's sale. Want of warranty is not because the sale is judicial but because it is not the owner who moves the court. The creditor has no special means of knowing more of the title sold than the purchaser has. The debtor does not warrant, since he does not sell. The judge is not the vendor and is therefore no warrantor. The executing officer is a mere instrument of the law; and though presumed to know that what he sells is the defendant's, he gives no guaranty. *Caveat emptor.*

Exception to the general rule of no responsibility in creditors'

sales must be briefly pointed out. The creditor, though not ordinarily presumed to know the title sold any more than the judge or sheriff does, is yet the beneficiary of the sale—the recipient of the price. It has been held that if his gain is another's loss by reason of any agency of his, he is liable to be made to repair the wrong. In other words, it has been held that if the plaintiff in execution is instrumental in causing the seizure and sale of property which does not belong to the judgment debtor, and the purchaser is ejected at the suit of a third person on an anterior and superior title, the purchaser can recover the price of the plaintiff "upon the principle that he has parted with his money, through the agency of the plaintiff, for a consideration which has failed."[1] The writer would not be understood to say that mere agency in causing the sale always renders the creditor responsible. In all execution sales the creditor is instrumental in causing the seizure and sale. It is emphatically so in attachments, as the property attached is taken by the officer before judgment and often long held before final sale; especially is the instrumentality of the attaching creditor apparent when he points out property of the defendant to be attached and takes the obligation of an indemnity bond to the sheriff.

Doubtless the creditor who causes a purchaser to buy property of the debtor through false assurances that the latter has a good title may be held pecuniarily responsible for the wrong done the purchaser who is afterwards evicted because the title proved to be not what it was thus represented to be. It does not follow that the creditor may be cited in warranty in the ejectment suit. It is not possible that he can make the title good. He was not the vendor. The sale was not an owner's sale. As to the creditor's being the beneficiary, he may be considered such rather than the court or the executing officer can be; but the debtor is the real beneficiary, since he gets his debt

[1] Sanders *v.* Hamilton, 3 Dana, 550; Brummell *v.* Hurt, 3 J. J. Mar. 709; Hanna *v.* Guy, 3 Bush, 93; Bromfield *v.* Dyer, 7 Bush, 505; Wolford *v.* Phelps, 2 J. J. Mar. 35; Hackley's Ex'r. *v.* Swigert, 5 B. Mon. 88; Bartholomew *v.* Warner, 32 Ct. 98; Piscataqus *v.* Kingsbury, 73 Me. 326.

paid out of the property of another owner. The creditor is only even: he had a judgment, and that is satisfied. The debtor is the real vendor: the court makes him sell against his will. He is not a warrantor consequently, for he is not a voluntary vendor. The conclusion is that ordinarily there is no warranty, though there may be pecuniary liability to the misled and evicted purchaser, on the part of the creditor who provoked the sale and fraudulently misrepresented the character of the title, thus entitling the purchaser to equitable relief.[1]

Sec. 3. Ejectment: Judgment-Owners' Sales as to Warranty; Difference between them and Attachment Sales.

Judicial sales provoked by owners are governed by the reverse rule. There is warranty; and the maxim, *caveat emptor*, is inapplicable. There is no difference, with respect to obligation of warranty, whether the sale by an owner be conventional or judicial. There is nothing sacred to the *mode* of sale which makes the owning vendor a guarantor under the one method and an irresponsible contractor under the other. All the reasons that render a private vendor responsible for the title he conveys apply when any proprietor sells through a court.

Nearly all judicial sales are provoked by judgment creditors: so, in nearly all, *caveat emptor* is applicable; and because such sales are so much more common than owner's court-sales, the idea has become popular that this mode of sale relieves from warranty. How often we see in law treatises and court reports the statement made unqualifiedly that there is no warranty in judicial sales!

Yet, were the writers' and judges' attention called to the difference between an owner selling under court-order and a creditor thus selling, the statement would be qualified by them at once. Who of them would contend that a judicial sale provoked by owners to effect a partition of property is without warranty? Were the subject now specially in hand, many

[1] Cooper *v.* Cooper, 4 Irish Eq. N. S. 75; Lawrence *v.* Connell, 4 Johns. Eq. 325; Preston *v* Frye, 38 Md. 222; Norton *v.* Moyers, 25 Ga. 89.

illustrations of responsibility on the part of the seller, and relief to the purchaser, with the application of the maxim, *caveat venditor*, when the sales were judicial, might be suggested, and authorities cited.[1]

The *mode* is immaterial. The *owner* cannot escape responsibility, whether his sale is private or judicial. He is "bound to know that he actually has that which he professes to sell."[2]

If he conveys nothing, payment of the price to him would be "without the shadow of consideration," and he, though acting by honest mistake, could not retain the price.[3]

Governments selling as owners necessarily employ some agent of sale, and often sell through the courts; but they are none the less warrantors because of this mode of sale. They are morally bound to make good the conveyance; and the federal government has made itself legally so bound by authorizing suits against itself in the court of claims upon any contract expressed or implied, which includes the express or implied contract of warranty. The rule governing private contracting parties is fully applicable to the sovereign-vendor when he makes contracts, and must be applied by courts in which he

[1] Sands *v.* Lynham, 27 Gratt. 304; McLaughlin's Admr. *v.* Daniel, 8 Dana, 182; Valle's Heirs *v.* Flemming's Heirs, 29 Mo. 152; Shroyer *v.* Nickell, 55 Mo. 269; Evans *v.* Snyder, 64 Mo. 516; Hudgens *v.* Hudgens, 6 Gratt. 320; Howard *v.* North, 5 Tex. 315; Mocklee *v.* Gardner, 3 Har. & G. 176; Grant *v.* Lloyd, 12 S. & M. 191; Petty *v.* Clark, 5 Pet. 481; Preston *v.* Frye, 38 Md. 222; Schwinger *v.* Hickock, 53 N. Y. 280; Davis *v.* Railroad, 1 Woods, 661; Bland *v.* Bowie, 52 Ala. 152, 162; Bell *v.* Craig, Id. 215. (See McQuiddy *v.* Ware, 20 Wall. 19; Gay *v.* Alter, 102 U. S. 79.) Strode *v.* Patton, 1 Brock. 228; Smith *v.* Wells, 69 N. Y. 601; Ingersoll *v.* Mongam, 84 N. Y. 622.

[2] Allen *v.* Hammond, 11 Pet. 72; Garnett *v.* Macon, 2 Brock. 185; Gardiner *v.* Mayor, 26 Barb. 423, and cases cited; Martin *v.* McCormick, 4 Seld. 331; 17 Com. Bench, N. S. 721; 1 Met. (Ky.) 192–3.

[3] Allen *v.* Hammond, 11 Pet. 63, 71, 72; Hart *v.* Swayne, Law Rep. 7, Ch. Div. 42; Hitchcock *v.* Giddings, 4 Price, 135; Conturie *v.* Hastie, 5 Ho. Lords Ca. 673, 681; Daniel *v.* Mitchel, 1 Story, 190; Torrance *v.* Bolton, L. R. 14 Eq. 124; Rice *v.* Dwight Man. Co. 2 Cush. 80; Thompson *v.* Gould, 20 Pick. 139, 141 and cases cited; Gardner *v.* Lane, 9 Allen, 492, 499; Paddock *v.* Kittredge, 31 Vt. 383; Martin *v.* McCormick, 4 Seld. 331; Sugden on Vendors and P. 120, 14 Ed.; Fish *v.* Street, 27 Kan. 270.

allows himself to be sued; for, otherwise, his consent to be sued would be delusive.[1]

In government cases of forfeiture, the judicial sales that follow condemnation are not in execution of the judgment. The government becomes the owner by the forfeiture, and need not sell at all. It does not become a judgment creditor, bound to sell to effectuate the judgment. It sells because it does not choose to become a general property-holder, and because the statutes authorizing the forfeiture proceeding usually provide for sale to follow. Some of such statutes provide for the retention of the condemned *res* by the government; one or more authorize its private sale. It is so common however for judicial sales to follow such condemnations that some have supposed such vendition to be in execution of the judgments, and to be necessary under any circumstances. There is an amusing instance of the government selling its own money. Having seized and caused the condemnation of ten thousand dollars, and having thus become the adjudicated owner and possessor of that sum, it actually, under *vend. ex.*, sold its own money at auction.[2] It exchanged its dollars for equivalent dollars. If the Secretary of the Treasury should expose the specie of his vaults at vendue, the operation would not be more superfluous and unmeaning.

Should suit be instituted against the United States to recover the money, (now wrongfully in the treasury if the judgment of forfeiture was a nullity,) would the curious ordeal through which the money passed enable the defendant to keep the money on the plea that the sale was judicial?

Untenable as such a defense would appear, it is not more so than it would be if interposed against the recovery of the price of land or other property sold by the government as owner

[1] McKnight *v.* United States, 98 U. S. 186. See Marsh *v.* Fulton, 10 Wall. 696; U. S. *v.* Arredondo. 6 Pet. 711; Polk *v.* Wendall, 9 Cr. 87–99. If the plaintiff's money is "wrongfully in the treasury, and an implied contract results in the nature of a contract for money had and received, he can, on the plainest principles of common justice, maintain this action and recover it back." Brand *v.* United States, 5 Ct. of Claims, 312; Bank Cases, 10 Id. 519; U. S. *v.* State Bank, 96 U. S. 30.

[2] Mentioned in Phœnix Bank *v.* Risley, 111 U. S. 128.

under a void judgment of forfeiture. The sale of condemned land would not be absurd like the sale of dollars for dollars; but the plea that the price may be kept because the sale was judicial when the condemnation has been adjudged void, is as untenable in the one instance as in the other.

And yet, in the last case cited, and in that which the court had under review,[1] a proceeding upon forfeiture was held not general, but limited; just as though it had been an attachment suit against the property of a debtor in which the judgment would be void if the property proved to have belonged to some other owner. In the one case, the sale, though judicial, is provoked by an adjudicated owner who is bound to make it good; in the latter, the sale, though also judicial, is provoked by a creditor, and is made in execution of the judgment.

In *The Phœnix Bank* v. *Risley*, *supra*, the Supreme Court did not reaffirm its own decisions which had been relied upon by the Court of Appeals to prove that the forfeiture under consideration was of the same effect as an attachment judgment, but put its opinion on the ground taken by the trial court—that the money forfeited was not *the* money sued for by Risley; that a special deposit was condemned but a general deposit sued for, *etc.* There are remarks however indicating that the court recognized a resemblance between forfeiture under the statutes discussed and a judgment for debt in favor of an attaching creditor. It is unnecessary to do more than merely advert to this. Though the proceeding was for forfeiture and the seizure not in admiralty, it was suggested that there might have been garnishment under the thirty-seventh Admiralty Rule, relative to admiralty attachments, by authority of a statutory provision.[2]

Whatever the method, an owner cannot have the price of what he sells after it has been decided that he gave no title; after the purchaser has been evicted at the suit of one exhibiting an anterior and superior title.

Suppose two persons should assume to own another's prop-

[1] Risley *v.* Phœnix Bank, 83 N. Y. 318.

[2] XII Stat. at large, p. 591, § 7, now repealed.

erty in partnership, collude to defraud him, sue for a sale to effect a partition, obtain a court order, and pocket the proceeds —would the purchaser, subsequently evicted by the real owner, be cut off from the recovery of the price because the sale was judicial? Suppose an administrator should cause the judicial sale of property not belonging to the estate he administers, would the purchaser, when ejected by the true owner, have no claim to recover the price?

Fraud might be shown in the supposed cases, it will be replied. In answer it may be said that legal as well as moral fraud invalidates a sale. It is legal fraud for one to sell what he does not own, even though he sell through honest mistake; and the purchaser is entitled to relief and complete indemnification.[1] A mistake is as good a ground for relief as fraud.[2] The law holds the vendor bound to know that he has that which he sells;[3] and the purchaser may rightfully rely upon his representations.[4] And a misrepresentation in a judicial sale, misleading the purchaser, entitles him to relief as fully as if made in a private sale.[5]

"The juridical influence of error is united with the juridical

[1] Hart *v.* Swaine, Law Rep. 7 Ch. Div. 42; Rawlins *v.* Nickham, 3 DeG. & J. 316; Bower *v.* Fenn, 90 Pa. St. 362.

[2] Daniel *v.* Mitchel, 1 Story, 190; Paddock *v.* Kitredge, 31 Vt. 383; Smith *v.* Richards, 13 Pet. 38; Torrence *v.* Bolton, L. R. 14 Eq. Ca 124; Reese River S M. Co. *v* Smith, L. R. 4 H. L. Ca. 80, Peck *v* Guerny, L. R. 79, 113; Redgrave *v.* Hurd, 20 Ch. Div 12, 13; Phelps *v.* White 7 L. R. Irish Eq. 160; Mathias *v.* Yetts, 46 L. T. (N. S.) 497.

[3] Allen *v.* Hammond, 11 Pet. 72; Garnett *v.* Macon, 2 Brock. 285; Cato *v.* Thompson, 47 L T. (N. S.) 491.

[4] Boyce *v.* Grundy, 3 Pet. 218; Mead *v.* Bunn, 32 N. Y. 275; Brown *v.* Rice's Admr. 27 Gratt. 474; Parkham *v.* Randolph, 5 How. (Miss.) 451; Reynell *v* Sprye, 1 De G M & G. 710; Smith *v.* Reese River S. & M. Co. L. R. 2 Eq. 264.

[5] Cooper *v.* Cooper, 4 Irish Eq. R. (N. S.) 75; Lawrence *v.* Cornell, 4 John. Ch. 352; Preston *v.* Frye, 38 Md. 222; Norton *v.* Moyers, 25 Ga. 89; City of Charleston *v.* Blohme, 15 S. C. 124; (See State *v.* Gaillard, 2 Bay, 11; Means *v.* Brickell, 2 Hill, 657; Adams *v.* Kibler, 7 S. C. 58; Mitchell *v.* Pinckney, 13 S. C. 203) In Cooper *v* Cooper, property sold under a decree was represented as within certain bounds and containing a specified quantity. The purchaser paid the price and took possession but was afterwards evicted

facts of a case, *ex facto oritur jus*, or with the grounds of the rise and fall of the legal relations. Error may modify exceptionally the regular consequences of judicial facts. Where there is *no contract* for want of an *aggregatio mentium*, the conclusion is clear. Where error does not affect the legal relations, there is *restitutio in integrum*. The idea of the law is to give relief where no fault exists; where it is difficult or impossible to avoid an error of law, relief is given."[1]

Responsibility cannot be escaped on the argument that the other contracting party had notice of the nullity of the title when the mutual stipulations were entered into. If one had notice, both had; for the selling contractor was bound to know that he legally owned that which he professed to sell.[2]

It was said of vendors: "The defendants undertook to sell *something* when really they had *nothing* to sell. The thing intended to be sold had no legal existence; and, where that is the case, there can be *no* contract of sale."[3] "It was not *selling an interest subject to chance*, for the defendant had *no interest at all* to which a chance could attach."[4]

If the sale is purely apparent, not in the least degree real and actual, it is without any judicial existence; and its legal non-existence may be urged by the true proprietor against the buyer as much as by the buyer against the seller.[5] "The obligation to do justice rests upon all persons, natural and artificial; and if a county obtain the money or property of others

of a portion at the suit of another. It was held that notwithstanding the purchase money received at the judicial sale had been partially distributed, the purchaser was entitled to compensation because he had not got what the court had assumed to sell. To the same effect: Strode *v.* Patton, 1 Brock. 228; Ingersoll *v.* Mongam, 84 N. Y. 622; Smith *v.* Wells, 69 N. Y. 601; Shirley's Admr. *v.* Jones, 6 B. Mon. 275. The case of the Monte Allegre, 9 Wheat. 616, in which *caveat emptor* was invoked, was *not* a sale by the United States as *owners* of property adjudicated to them.

[1] Snell *v.* Ins. Co. 98 U. S. 85; Merchants' Bank of Baltimore *v.* Campbell, 75 Va. 455.

[2] Allen *v.* Hammond, 11 Peters, 72; Garnett *v.* Macon, 2 Brock. 185.

[3] Gardner *v.* The Mayor, 26 Barb. at p. 427, and the authorities there cited; 2 Kent, 468; 1 Story Eq. Jur. § § 142, 143.

[4] Hitchcock *v.* Giddings, 4 Price, 135, quoted in 26 Barb. (just cited,) at p. 426.

[5] Bender *v.* Fromberger, 4 Dallas, 436.

without authority, the law, independent of any statute, will compel restitution or compensation."[1]

The nullity of a judgment precludes the application of *caveat emptor*, and renders *caveat venditor* the proper maxim; for "the vendee might resist an action for the purchase money by showing that no contracts of sale could grow out of that which was in a law a nullity.[2]

And it has been held for a long time that money paid under a void judgment or sale may be recovered back on the ground of a failure or want of consideration.[3]

It is the duty of the selling party to see to the sufficiency of the authority for selling.[4] The purchaser, even at a tax sale, has the right to presume that the officer selling has authority to sell what he offers, and he may recover the price bidden and payed, if the officer had no authority or if the State had no right to sell.[5]

No particular form of words are legally prescribed for the stipulation of warranty.[6] The *existence* of that which is the object of the price is always warranted, without the necessity of express guaranty in the deed. Acceptance of the price by the seller, whether a private or sovereign vendor, is ratification of the warranty.[7]

When any one, not an owner, has sold real estate as his own, and the purchaser has been evicted of the property, and made

[1] Marsh *v.* Fulton Co. 10 Wall. 676; U. S. *v.* Arredondo, 6 Pet. 711; McKnight *v.* United States, 98 U. S. 186.

[2] Commissioners *v.* Watts, 10 Watts, 392–3; Bramfield *v.* Dyer, 7 Bush, 505,508; Darwin *v.* Hatfield, 4 Sandf. Sup. Ct. 468; Shirley's Adm. *v.* Jones, 6 B. Mon. 275; Post *v.* Leet, 8 Paige, 337; Seaman *v.* Hicks, Ib. 655; Brown *v.* Frost, 10 Ib. 243.

[3] Newdigate *v* Davy, 1 Ld. Raym. 742; Chapman *v.* City of Brooklyn, 40 N. Y. 372; McGoren *v.* Avery, 37 Mich. 121–2; Norton *v.* Rock Co. 13 Wis. 611, 612–3; Henderson *v.* Overton, 2 Yerg. 394; Sands . Lyndham, 27 Gratt. 291, 304; Earl *v.* Bicksford, 6 Allen, 549, 550.

[4] Norton *v.* Rock Co. 13 Wis. 611–3; McGoren *v.* Avery, 37 Mich. 121; Gardner *v.* Mayor, 26 Barb. 423.

[5] 13 Wis. 611–3; 37 Mich. 121–2; cited in full on the previous point.

[6] Newcomb *v.* Presbrey, 8 Met. 410; Van Rensselaer *v.* Kearney, 11 How. 322, 323, 325; Chitty on Contr. 643, (11th Ed.)

[7] Brown *v.* United States, 6 Ct. of Cl. 171; Veazie *v.* William, 8 How. 157; Elwell *v.* Chamberlin, 31 N. Y. 619; Churchill *v.* Palmer, 115 Mass. 310; 2 Ct. of Cl. 476.

accountable for the rents from the date of his possession, it has been held that the rule of damages is "the consideration or value of the land at the time of the sale as then agreed upon by the parties or as determined by the price paid, with interest for such time as the purchaser has been deprived of, or is accountable to the superior owner for the mesne profits, together with the costs in defense of the action by which the party was evicted."[1]

Sec. 4. Ejectment: Attachment-Debtors' Sales before the Amendment of Radical Defects.

When third persons have acquired right to or in property, at a time when the attaching creditor has acquired no lien whatever, they cannot be affected by a subsequent judgment in favor of the attaching creditor. The purchaser of property at a judicial sale provoked by the attaching creditor in execution of a judgment upon a void writ or warrant, cannot hold against a purchaser from the defendant though the latter may have bought after the levy.[2] But there are stages in the course of the lien's creation from its inception by seizure to its perfection by judgment and its final enforcement by the execution of the decree in the sale of the attached property and the satisfaction of the debt from the proceeds, in which sale or hypothecation by the debtor to third persons gives rise to interesting questions.

If property has been attached under defective proceedings which are subsequently amended, may the debtor sell or hypothecate it, before the amendment, so as to give the purchaser or mortgagee a right to or in it free from any attachment lien?

The hypothetical character of the lien needs a word of explanation. It is different at different stages of the proceedings prior to judgment. When the issue of the writ creates the lien it is on the condition that the execution of the writ and all other proceedings necessary to judgment shall follow; and

[1] Bender *v.* Fromberger, 4 Dallas, 436–444. II. Greenleaf's Ev. § 264 and cases cited. IV. Kent's Com. * 474–475 and cases cited.

[2] O'Farrell *v.* Heard, 22 Minn. 189

where the execution of the writ creates the lien, it is on the condition that such proceedings shall follow; and, under both practices, the preliminary requisites must have been observed before such lien, dependent upon subsequent judgment, can be legally brought into being. If seizure has been made and the summons returned unserved and publication has been ordered, what is the character of the lien at that stage? The debtor has not been reached: can he sell the seized property free from the lien? If he can, the attachment remedy would often prove worthless. The attaching creditor must have due time in which to comply with statutory requirements. He is guilty of no laches when he has caused a summons to issue and publication to follow: it is the law which requires a period in which the advertisement shall stand and fixes the time for the sheriff's return showing the publication, and it may be owing to incontrollable circumstances that the debtor cannot be brought into court. There is a space of time between seizure and the completing of the time of notice when the attachment proceeding has not been brought home to the defendant; and then, though the lien depends upon the publication for the full time, the character of it is such that the defendant cannot convey the attached property free from the incumbrance. It has been held that a pending attachment proceeding cannot be treated collaterally as void for errors that are amendable.[1] If, however, the preliminary statutory requisites have not been observed, or the observance has been fatally defective, or the notice issued is void for any cause, the defendant may sell the attached property free

[1] Barber *v.* Smith, 41 Mich. 138. See Tilton *v.* Cofield, 93 U. S. 163; Kimball &c. Man. Co. *v.* Vroman 35 Mich. 310; Merrill *v.* President &c. of Kalamazoo, Id. 211; Smith *v.* Canfield, 8 Mich. 493; Final *v.* Backus, 18 Mich. 218; Johnson *v.* Huntington, 13 Ct. 47; Tobey *v.* Claflin, 3 Sumn. 379; Brace *v.* Benson, 10 Wend. 214; Bartholomew *v.* Chautauqua Co. Bank, 19 Wend. 99; Lynch *v.* Mechanics' Bank, 13 Johns. 127; Pate *v.* Bacon, 6 Munf. 219; Totty *v.* Donald, 4 Id. 430; Barnett *v.* Watson, 1 Wash. (Va.) 372; Bentley for Smith 3 Caines, 170; Lewis *v.* Locke, 41 Vt. 11; Wright *v.* Hale, 2 Cush. 486; Crafts *v.* Sykes, 4 Gray, 194; Nimmon *v.* Worthington, 1 Ind. 376; Jones *v.* Miller, 1 Swan, (Tenn.) 319, relative to amendments in attachments and other proceedings.

from lien, and an honest purchaser would acquire a good title from him at this stage.

If preliminaries were merely irregular but the issued notice void, the subsequent general appearance of the defendant would cure both and render the seizure good, as to himself, from its date. But, viewed from the position of one who meanwhile honestly has purchased or acquired a lien, the question is whether he would be affected by the subsequent appearing of the defendant thus healing the defect of the publication?

It was held that a writ, void because it did not contain any direction to the sheriff to summon the defendant, as required by statute, and because the affidavit did not state the debt to be due as required, and did not state the amount of indebtedness above all legal set-offs, could be amended only as between the parties, so that rights of third persons intermediately acquired could not be affected by the amendment.[1]

The action was brought by Brunette, sheriff, against Whitney for trespass by replevying timber held under attachment. The validity of the attachment was drawn in question; and it was held void on the grounds above stated. Could such void writ be amended? Mr. Justice Paine, in delivering the opinion of the court, said that the statute of amendments then in force was "very broad and liberal. It provided that the court in which any action was pending might 'amend any process, pleading or proceeding in such action, either in form or substance, for the furtherance of justice,' etc. But I think this relates only to such defects as do not render the process absolutely void. There must be something to amend, and a void writ is a nullity. To amend in such a case would be to create a writ anew, giving it a retroactive effect."[2] He added that if a void writ can be helped by amendment, it can be done only so as to affect the parties—not a third person who has acquired rights before the amending.[3]

[1] Whitney *v.* Brunette, 15 Wis. 61.

[2] Citing: Bunn *v.* Thompson, 2 John. 190; Burk *v.* Barnard, 4 Id. 309; Bell *v.* Austin, 13 Pick 90; Gardner *v.* Van Alstine, 9 Johns. 386; Kyles *v.* Ford, 2 Rand. 4.

[3] Citing: Witte *v.* Meyer, 11 Wis. 300.

In the attachment suit under which the sheriff had held the timber, the defendant had appeared and thus healed the want of notice so far as he was concerned, but Whitney had bought the property before the healing of the defect; and as he was not a party to that suit, his title was unaffected by the emendation.

It is true that he bought of the attachment defendant, but it was held that he was not therefore a privy in such a sense as to render the judgment that followed preclusive against himself. The learned justice said: "It is true that privies as well as parties are bound by a judgment. But I do not understand that rule to go so far as to hold purchasers bound by subsequent litigation in respect to the property between their vendors and others. Privies, within the rule, are those who subsequently to the litigation succeed to the rights of the parties."

It was contended that because the attachment defendant had appeared and moved to set aside the attachment and had had judgment against him, the decree sustaining the proceedings was *res judicata*: to which the court say that "the true answer to this position is, that the decision of a court, in a proceeding in which it has not jurisdiction, does not give it jurisdiction. * * * Upon any other principle, the decision of any tribunal not having jurisdiction, in favor of its jurisdiction, would give its judgment equal validity with that of a court having jurisdiction. The question in every such case is, Was there jurisdiction? and not, Did the court assuming to exercise it declare that there was? And the power to decide upon its jurisdiction is not the very jurisdiction in question. For every court has this power, and if that gave it jurisdiction, it would be the duty of every court in all cases to decide in favor of its own jurisdiction, for the very power to decide at all on the question would show that it had the jurisdiction, which is an absurdity."

Conceding that the personal judgment against the attachment defendant after his general appearance was *res judicata* as to him, the court concluded that it did not operate on the attached timber nor affect the title of the purchaser who had bought of the defendant before he had appeared.

As suggested by Chief Justice Dixon in the same case, this

principle has frequently been recognized in contests between competing attachers. When the senior attachment has been void for want of the statutory requisites, a junior one has been given the precedence, though the former's defects have been subsequently supplied; and, when not supplied, the junior attacher may have the senior writ set aside.[1]

In the latter case, the same court held that the statutory requisite that "in all cases where publication is made, the complaint shall be first filed, and the summons as published shall state the time and place of such filing," is essential to the jurisdiction; and that if the property attached be sold by the defendant after such publication and before his voluntary appearance in the case, the purchaser would obtain a good title.[2]

Before the appearance of the defendant in the above cited case, judgment by default had been rendered and the land attached had been sold under execution. He then appeared to move the setting aside of the judgment and execution; and this, because of allegations affecting the merits, was held to be a general appearance, curing the defect of the publication so far as he was concerned, but not affecting the rights of the purchaser acquired while the attachment proceedings were yet void. The contest was between the purchasers: one buying under the execution and the other buying of the attachment defendant before the defect of the proceedings had been cured. It was a case of ejectment by the latter against the former.

The judgment in the attachment suit was *res adjudicata* between the parties to it, and therefore unassailable by collateral attack so far as the personal decree was involved; but the *res* of the ancillary proceeding was not the property of the defendant and the judgment must be understood to have reference to it

[1] Lawless *v.* Hackett, 16 John. 145; Davis *v.* Morris, 21 Barb. 152; Johnston *v.* Fellerman, 13 How. 21; Von Beck *v.* Shuman, Id 472; Plummer *v.* Plummer, 7 Id. 62; Schoolcraft *v.* Thompson, Id. 446; Chappel *v.* Chappel, 2 Kern. 215; Fairfield *v.* Baldwin, 12 Pick. 388; Denny *v.* Ward, 3 Id. 199; Price *v.* Jackson, 6 Mass. 242; Gardner *v.* Hust, 2 Rich. 601; Walker *v.* Roberts, 4 Id. 561; Barnet's Case, 1 Dall. 152; Kennedy *v.* Baillie, 3 Yeates, 55, *cited*.

[2] Anderson *v.* Coburn, 27 Wis. 558, re-affirming Whitney *v.* Brunette, *supra*.

only as *his* property. The general doctrines that a judgment conclusive between the parties cannot be collaterally impugned by either of them, except for fraud or want of jurisdiction,[1] and that a valid attachment, a valid judgment and a valid sale give the purchaser a valid title,[2] do not preclude one who was not a party to the proceedings, and who did not acquire his title from a vendor who was a party when he sold (for had he then been a party the purchaser would have been a privy,) from suing to recover his own by ejecting a wrongful possessor. The heirs of a vendor would be concluded, as his privies, should he convey his interest by deed, to cure supposed defects of a title from judicial proceedings.[3]

The abuse of the term "jurisdiction" has been a frequent cause of remark in the foregoing pages; but perhaps it is never more mischievous than when jurisdiction in the principal suit is misapplied with reference to ancillary attachments. A court, competent to try the principal cause when the defendant has been summoned or has appeared, cannot rightfully be said to have jurisdiction in an ancillary proceeding by attachment in which the statutory requisites have been disregarded. Such requisites, (except summons, and publication on failure of service,) are not waived by his general appearance. This is apparent when liens are marshalled — the creditor who has neglected the requisites has no lien to interpose against junior attachers who have observed them.

A court, though of general jurisdiction, cannot assume that which is specially conferred upon conditions, though it may be already vested with power over the defendant in an action against him for debt. This proposition is well established by

[1] Abbott *v.* Semple 25 Ill. 107; N. A. R. R. Co. *v.* Combs, 13 Ind. 490; Ulmer *v.* Hiatt, 4 G. Greene, 439; Clark *v.* Blackwell, Id. 441; Fee *v.* Iron Co. 13 Ohio St. 563; Geurmell *v.* Rice, 13 Minn. 400; Kipp *v.* Fullerton, 4 Minn. 473; Fulbright *v.* Cannefox, 30 Mo. 425; Campbell *v.* Moore, 3 Wis. 767; Stonach *v.* Glessner, 4 Wis. 278; Allen *v.* Lee, 6 Wis. 478; Barnum *v.* Fitzpatrick, 11 Wis. 81; Tallman *v.* McCarty, Id. 401; Upper Miss. Co. *v.* Whittaker, 16 Wis. 221; Foot *v.* Stevens, 17 Wend. 483.

[2] Mattingly *v.* Boyd, 20 How. 128; Carney *v.* Emmons, 9 Wis. 114; Lackey *v.* Seibert, 23 Mo. 85; Cockey *v.* Milne, 16 Md. 200.

[3] Mason *v.* Tuttle, 75 Va. 105. But see French *v.* Wade, 102 U. S. 132.

hundreds of decisions; but there are some apparently in conflict which need to be reconciled with the general doctrine. Densmore *v.* Matthews[1] may be instanced among the latter; but the extract from the principal authority cited by the court, after enumerating several amendable defects, closes with the remark that such errors cannot "deprive the court of the jurisdiction acquired by the writ levied upon the defendant's property."

Here is ground for reconciliation, so far as the legal dispute is concerned. Given, that a court has jurisdiction over the property by the levy of a valid writ, and over the defendant by his appearance in court, the conflict is at an end. The case had been decided on the failure of the creditor to swear that his debt was due and the consequent nullity of the writ: it was reversed on the argument that the defects in the attachment proceedings were only such as the personal appearance of the debtor had cured. The facts that the statute required affidavit of the maturity of the debt, and that such affidavit was not made, were not questioned; but the court treated them as curable defects — of which it is not proposed to comment — and re-affirmed the doctrine of the principal authority cited that curable defects cannot deprive a court of jurisdiction when it has been acquired.

Sec. 5. Bond-Suits against Attaching Officers.

The attaching officer may be sued upon his bond for taking the property of an owner who is not the defendant in the attachment suit. The bond is given for the faithful performance of his official duties, and any one injured by a breach of the bond may sue upon it and recover the damages sustained. The bond required of marshals of the United States is for the faithful performance of official duties by themselves and their deputies; and it is provided by statute that any person injured by a breach of the conditions of the bond may sue upon it in his own name and for his own use.[2]

The State statutes are usually similar; and wherever they are so, the same right of action exists against the sheriff as against the marshal in the federal courts.

[2] 109 U. S. 216.

[3] U. S. Revised Stat. § § 783, 784.

The bond being official, and the wrongful seizure of a third person's property an official act, (though not authorized by the attachment writ and therefore not a valid seizure but a mere act of trespass,) the officer's sureties are also liable upon the bond. Whether the attachment be rightful or wrongful, it is an official act, and the obligation of the sureties is that their principal shall faithfully perform his duties and that they will be responsible for any breach of duty on his part to those whom the wrong-doing may concern. It is definitely decided that the attachment of property by the marshal under the writ is an official act whether the thing seized belongs to the defendant or to another—(that is, whether the officer is under the protection of the writ or not—whether he has attached what he was ordered to take or something else—) and therefore, if wrongful, it is a breach of the conditions of the bond for which both himself and his sureties are liable in damages to the injured owner of the property wrongfully attached.[1]

It has also been held that a seizure by a sheriff, under such circumstances, is official misconduct, a breach of the conditions of the bond, and that an action in damages lies against both him and his sureties; and the reason given is that such abuse of the writ is done *colore officii*, and is not merely an individual act of trespass.[2] The case is not as though the officer should attach without any writ at all: with the writ, he acts officially though it be no warrant for taking what is exempt or what belongs to an owner not a party; without it, wrongful taking would not be officially done and the sureties would be irresponsible.[3]

The rule that sureties of sheriffs, constables, etc. are liable on the bond for the tortuous taking under a writ of property not authorized by the writ to be taken, has been frequently recognized by the State courts, though they have not been unanimous on the subject.[4]

[1] Lammon *v.* Feusier, 111 U. S. 17; U. S. *v.* Hine, 3 MacArthur, 27.

[2] State *v.* Jennings, 4 Ohio St. 418, 423.

[3] City of Lowell *v.* Parker, 10 Met. 309; Grinnell *v.* Phillips, 1 Mass. 530.

[4] *For the rule:* Charles *v.* Haskins, 11 Iowa, 329; Turner *v.* Killian, 12 Neb. 580; Holliman *v.* Carroll, 27

The rule applies when the lawful possession of lien-holders is wrongfully disturbed by an official act in abuse of a writ of attachment. Every argument in its favor when owners, who are not parties, are dispossessed is equally applicable when any lawful possession is thus molested. The Supreme Court, in deciding *Lammon* v. *Feusier*, above cited, said that it did so "upon the weight of authority as well as upon principle," yet it had but recently held that a marshal who had seized goods in the possession of chattel mortgagees under an attachment writ directed against the property of the defendant was not liable to suit in a State court, as a trespasser, to the persons disturbed who were not parties to the suit.[1] The law stated in the Lammon case: "A person other than the defendant named in the writ, whose property is wrongfully taken, may indeed sue the marshal, like any wrong-doer, in an action of trespass, to recover damages for the wrongful taking; and neither the official character of the marshal, nor the writ of attachment, affords him any defense to such an action," if inconsistent with the doctrine of the Densmore case, (last cited,) is later; and it must govern.

A mortgagee disturbed in his possession and wronged by the sheriff, has his action therefor even though he has been cited, interrogated and discharged as trustee or garnishee in the case. If he has appeared and answered that he holds no goods, effects or credits of the defendant, and makes no mention of the existence of the mortgage—not being interrogated respecting it—and is thereupon discharged without objection on the part of the plaintiff, he is held to be in the position of a mortgagee

Tex. 23; State *v.* Fitzpatrick, 64 Mo. 185; Jewell *v.* Mills, 3 Bush, 62; Greenfield *v.* Wilson, 13 Gray, 384; Carmack *v.* Commonwealth, 5 Binney, 184; Brunott *v.* McKee, 6 Watts & S. 513; Mayor of New York *v.* Sibberns, 3 Abb. App. 266; Cumming *v.* Brown, 43 N. Y. 514; People *v.* Lucas, 93 N. Y. 585; and cases cited *ante* p. 188 note 4.

Against the rule: Carey *v.* State, 34 Ind. 105; Jenkins *v.* Lemonds, 29 Id. 294; Gerber *v.* Ackley, 37 Wis. 43; (same title, 32 Id. 233;) McElhaney *v.* Gilleland, 30 Ala. 183; Governor *v.* Hancock, 2 Id. 728; State *v.* Conover, 4 Dutch. 224; State *v.* Long, 8 Iredell, 415; State *v.* Brown, 11 Id. 141; Brown *v.* Mosely, 11 Smedes & M. 354; People *v.* Schuyler, 5 Barb. 166 (reversed in 4 N. Y. 173;) *Ex parte* Reed, 4 Hill, 572 (overruled in 4 N. Y. 173.)

[1] Densmore *v.* Matthews, 109 U. S. 216. *See Ante*, pp. 77-8, 146-7; 328.

who has not been cited in the garnishment at all, and he may therefore maintain an action for any wrong done him by a subsequent sale of the goods and payment of the proceeds to the attaching creditor.[1] Discharge, under such circumstances operates as a dissolution of the attachment,[2] and this is given as a reason why the mortgagee may sue; but it has been held that if he is defaulted for non-appearance after notice, and the garnishment thereupon sustained, he cannot sustain such action against the sheriff.[3] It would seem, however, that if the interrogatories do not require any disclosure respecting a mortgage, his rights as a mortgagee should not be denied because of his remissness as a garnishee.

Sec. 6. Replevin Suit against the Attaching Officer.

It is held that an action of replevin will not lie against a marshal for taking the property of a person not named in the writ of attachment on *mesne* process, and holding it in his official custody under color of such writ, in any other court than that from which the writ was issued and in which the property is detained. Not only such action but any other to recover the property specifically, is held illegal if brought in any court but that which has control of the *res*, for the reason that property, seized by an officer acting by virtue of a court's process, is to be deemed in the court's custody, whether rightfully attached or not. Exception is made in favor of courts having direct supervisory control, or superior jurisdiction, over the tribunal in possession. This doctrine, that neither replevin nor any other action to regain possession will lie in a different court from that in which the attachment writ was issued, by the person wrongfully dispossessed, is treated by the Supreme Court as definitely settled.[4]

The doctrine is extended to cases in which wrongful seizure

[1] Goulding *v.* Hair, 133 Mass. 78; Boynton *v.* Warren, 99 Mass. 172.

[2] Martin *v.* Bailey, 1 Allen, 381; Hayward *v.* George, 13 Allen, 66.

[3] Flanagan *v.* Cutler, 121 Mass. 96.

[4] Lammon *v.* Feusier, 111 U. S. 19, 20, citing Buck *v.* Colbath, 3 Wall. 334, 341; Freeman *v.* Howe, 24 How. 450; Krippendorf *v.* Hyde, 110 U. S. 276.

has been made under valid final process. Property seized in execution cannot be replevied by one who is not a party to the suit and who is the owner of the property levied upon as that of the defendant, unless he sue in the court which has control of the property. The same argument is used with respect to final as to *mesne* process. It is—that conflict of jurisdiction would ensue should the action of replevin in a different court be allowed.[1]

Mr. Justice Nelson, (approvingly quoted in the case last cited,) put the rule distinctly on the ground that jurisdiction over the same property could not exist in two courts at the same time; that if a State court has it over a *res* in an attachment suit, a federal court cannot acquire it by action of its marshal, for the purposes of a general proceeding *in rem;* and he said, for the Supreme Court, that "the question as to which authority should for the time prevail" does "not depend upon the rights of the respective parties to the property seized, whether the one was [is] paramount to the other, but upon the question which jurisdiction [has] first attached by the seizure and custody of the property under its process."[2]

The court, in the Covell case, comparing attachment and execution, say that "there is nothing in the nature, office or command of the two descriptions of process, by which, so far as the question here involved is concerned, they can be distinguished. One is mesne process and the other final; but in the courts of the United States the attachment cannot be used, as

[1] Covell *v.* Heyman, 111 U. S. 176, distinguishing Buck *v.* Colbath, and affirming the other three cases last cited. The court said, through Mr. Justice Matthews: "The case of Freeman *v.* Howe, 24 How. 450, was precisely like the present case in its circumstances, except that there the process under which the marshal had seized and held the property replevied, was an attachment according to the State practice of Massachusetts, being mesne process, directed, however, not against property specifically described, but commanding a levy, as in case of *fi. fa.*, upon the property of the defendant. Whether that difference is material is, perhaps, the only question to be considered, for the doctrine of that decision is too firmly established in this court to be longer open to question." A review of leading decisions follows, and the conclusion is as stated in the text.

[2] Freeman *v.* Howe, *supra*, citing Taylor *v.* Carryl, 20 How. 583.

in the practice of other jurisdictions, as means of compelling the appearance of the defendant, or of founding jurisdiction as a proceeding *in rem*." Can any difference be discovered between an ancillary attachment in a United States court and one in a State court? There is none. In both, the jurisdiction is special; in both, the remedy is statutory; in both, the property constituting the *res* must be in court or there is no jurisdiction over *it;* in neither can there be any compulsion of the personal debtor to come into court by attaching his property; in neither can there be any "founding of jurisdiction" by seizure only; in both, there is personal jurisdiction of the debtor cited or appearing; but when jurisdiction of a thing or a person, or both, has been acquired by a federal court, a State court cannot divest it—and *vice versa*, as this case conclusively holds. *En passant*, it seemed that the reader would be likely to notice the *obiter* relative to compelling appearance, and that dissent should be interposed; but nothing further is needed here since it has been suggested elsewhere that attachment as distress has fallen into disuse. Such attachment is without statutory warrant. The doctrine of the decision did not seem to need the last sentence above quoted.

It is merely a *quasi* jurisdiction that a court obtains by means of a wrongful seizure under a valid writ. It is simply the right to hold possession on the presumption that the attaching officer has obeyed the writ and taken the property of the defendant.[6] This presumption justifies the court in resisting interference from any other court except one having supervisory powers. It is for the court thus possessed to decide whether the attachment was lawful—not for some other tribunal to do so.

The profession would be sadly misled by the decisions in the Lammon and Covell cases should it understand the Supreme Court to say that the jurisdiction acquired by the wrongful seizure

[1] French *v.* Reel, 61 Iowa, 143: Held that there is a presumption in favor of the due execution of papers emanating from a public office, and upon proof that the writ of attachment under which the officers justify emanated from a court authorized to issue it, its sufficiency, etc. will be presumed.

of another's property in a suit against the defendant is such as to justify the condemnation of the property after the presumption has been removed. So soon as the court in possession is legally informed that its possession is unlawful, it is bound to restore the property to its owner. If upon evidence, or upon the admission of the plaintiff, or upon the correction of the officer's return, the fact should appear that the property belongs to another, or that the right of possession is in another, there must be an order of release. It would be unjust to the authors of the opinions in the two cases above mentioned, to attribute to them the assertion that tortuous attachment under a valid writ gives jurisdiction in the sense of right and power to try the cause.

Would not the owner of property condemned as another's in an attachment cause in which the owner was not a party have the undoubted right of collateral attack upon the judgment? Would not the absence of jurisdiction to try the cause plainly appear upon his proving that the property was his when it was held as the *res* in a suit against the attachmant defendant, and subsequently sold to effectuate a judgment rendered in such suit? That he would have such right, and that absence of jurisdiction-to-try would thus appear, conclusively shows that the only reason why other courts cannot replevy the *res* wrongfully held in the attachment case, is that the *quasi* right of the tribunal in possession is to determine for itself whether the seizure was lawful, under liability of having its determination subsequently disregarded if it should proceed further in the cause without statutory authority.

Mr. Justice Nelson thus understood this matter when, (as quoted above,) he described it as "the question as to which authority should *for the time prevail;*" *id est*, whether the court in possession or the one seeking to replevy should decide upon the right of possession. Jurisdiction to settle this question is what the court has upon wrongful seizure as an official act under a valid writ.

Thus rightly understanding the recent deliverances of the Supreme Court, (in accord with previous ones,) the profession

will appreciate the utility of the doctrine, and avoid the errors that would ensue from misconstruction.

Is there then no remedy for the dispossessed owner, bereft under a writ not directed against himself or his property? Suit upon the bond is not always an adequate one. He may prefer the specific property to its value in damages. He may have been robbed of an heir-loom which is priceless in his eyes. His right is to get the thing back, whether it be a family relic or common merchandise easily replaced by a re-investment of its moneyed value. How is he to get it?

By replevin where he can bring the action without clash of jurisdiction: in the court which has custody of the thing. The Supreme Court has pointed out the methods by which the wronged owner can obtain restitution when the property is in a federal court.[1] In a pending attachment cause, he may intervene and claim his property. He may institute an ancillary proceeding in the case.[2] He may sue upon the marshal's official bond, or sue that officer for trespass.

Replevin is the most usual resort in the State courts. Conflicts of jusisdiction would occur among them should they not forbear, through comity, to intermeddle with each other. Where there is no statutory regulation on the subject, comity involves a principle which should govern courts of concurrent jurisdiction. It is law everywhere that when one court has acquired jurisdiction of a thing or a person, another of equal or inferior grade cannot divest it; nor one of superior, except as authorized by law. The real question of difficulty has been whether any jurisdiction is acquired by a wrongful seizure.

The law in general terms may be thus stated when conflict of jurisdiction is out of the question: When the property of one who is not a party to the suit is attached in a proceeding between the parties, he may bring action against the sheriff; and replevin is a proper remedy.[3]

[1] Krippendorf *v.* Hyde, 110 U. S. 276.

[2] *Id.*

[3] Samuel *v.* Agnew, 80 Ill. 553; Heagle *v.* Wheeland 64 Ill. 423, (though not an attachment suit:) Climer *v.* Russell, 2 Blackf. 172; Daggett *v.* Robins, Id. 415; Clark *v.*

In the case first above cited, the court first inquires: "Does a judgment *in rem* in attachment, where goods belonging to a person other than the defendant in the attachment, and upon which there is no express prior lien in favor of the attaching creditor, have been seized by the sheriff, give the sheriff the right to hold the goods against the owner; or, in other words, convert what was before a tortuous possession into a lawful one?" The court found the true answer in the limited effect of such actions against property as herein repeatedly set forth, and said, (following previous decisions,[1]) that "the ordinary proceeding by attachment, although a proceeding *in rem*, has no such conclusive effect as a decree in admiralty; that a sale under it does not divest any liens of a superior degree, nor any antecedent liens of the same degree." And the court held that a third person owning the attached goods might recover them of the sheriff.

While proceedings *in rem* by attachment are of limited character under nearly all the statutes, exceptions have sometimes been made in authorizing the attachment of water-craft. In Missouri it was held that the condemnation and sale of a steamboat, to satisfy a lien under the water-craft law of that State enforced by attachment, gave the purchaser a title free from all other liens.[2]

Under a statute of Indiana, authorizing all lien-holders to intervene in a suit for wages, supplies, etc., against a vessel, it was held that all non-appearers were concluded by the attachment judgment against a steamboat. Though the statute was silent with respect to subsequent suits by lien-holders against a vessel condemned and sold at the suit of the first attacher, the court held that the admiralty practice was applicable; that they could not molest the purchaser who acquired under the judgment and sale, and that their only remedy was by personal

Skinner, 20 Johns. 465; Thompson *v.* Butler, 14 Id. 84; Garner *v.* Campbell, 15 Id. 401; Judd *v.* Fox, 9 Cowen, 259; Wells *v.* Baldwin, 61 Ind. 265.

[1] Germain *v.* Steam Tug Indiana, 11 Ill. 535; Propeller Hilton *v.* Miller, 62 Ill. 230.

[2] Steamboat Raritan *v.* Smith, 10 Mo. 527.

action against their personal debtor.[1] Subsequently it was held that such a claim being exclusively enforcible in admiralty as a maritime lien, the State court could not entertain such a general proceeding *in rem;* but that such general proceeding "for building, fitting out and constructing" a steamer is cognizable in such court. In such a case, the court said: "We are not aware that such a claim can be enforced in admiralty. We understand quite the contrary proposition to be adjudged in *The People's Ferry* v. *Beers*, 20 How. 393, and *Roach* v. *Chapman*, 22 *Id.* 129. It does not follow, because the statute has authorized a proceeding *in rem* to enforce the lien which it gives to the builder of a vessel that the suit to enforce it must be in admiralty. The jurisdiction of the federal courts cannot be thus enlarged by a State statute. It was so expressly held in *Roach* v. *Chapman*, *supra*. Nor can we perceive anything in our legislation giving the builder a lien which is in contravention of the constitution or laws of the United States."[2]

The constitutional right of States to resort to proceedings at law of this character, such as will preclude all persons after general notice followed by judgment against the *res*, seems entirely free from doubt. It has not been delegated exclusively to the general government, though like proceedings in admiralty have been thus delegated. The right of a State legislature to authorize such a proceeding at law was strongly asserted by the Supreme Court of Massachusetts through Chief Justice Shaw.[3] It was so held with reference to the forfeiture of things proceeded against as guilty or offending. Statutes of States authorizing such proceedings against such property have been

[1] The Steamboat Rover *v.* Stiles, 5 Blackford, 484.

[2] Wyatt *v.* Stuckley, 29 Ind. 279. (This case was followed in Stinton *v.* Steamboat Roberts, 34 Ind. 448, and (same title) 46 Ind. 476. In the last the court said: "It is well settled that the admiralty jurisdiction of the United States does not extend to cases where a lien is claimed by the builders of a vessel, for work done and materials furnished in its construction. * * The Steamboat Orleans *v.* Phœbus, 11 Pet. 175; The Belfast, 7 Wall. 624; Amy *v.* The Supervisors, 11 Wall. 136; Leon *v.* Galceran, Id. 185. * *.")

[3] Fisher *v.* McGirr, 1 Gray, 28.

sustained by Supreme Courts of States and that of the United States.[1]

Attachment proceedings, being never prosecuted for forfeiture but always to enforce a lien, and usually both to create and enforce it, ought not to be of general character, with notice to conclude all persons and destroy unasserted liens and rights to property; and the exceptional statutes with regard to watercraft, above noticed, have properly had little following. There is not the same justification for such statutes as there is for admiralty law under which liens are enforced by like proceedings.

Sec. 7. Subsequent Suits Against Garnishees.

The attachment debtor cannot destroy or impair any right which the attachment-creditor has obtained, by suing the garnishee after final judgment sustaining the garnishment; nor can he thus relieve the latter from liability to the garnishor.[2] His acceptance of voluntary payment at this stage would not relieve. He therefore cannot successfully sue upon the same debt which has been adjudicated by the garnishment judgment, nor for the same property thus adjudicated, when payment or delivery have followed.[3] Neither the attachment-debtor nor the garnishee can attack such judgment collaterally, if the court had jurisdiction, though the court may have been only such *de facto* and the proceedings irregular,[4] and the notice somewhat defective.[5]

[1] Beer Co. *v.* Massachusetts, 97 U. S. 25; Bartemeyer *v.* Iowa, 18 Wall. 129; Commonwealth *v.* Intoxicating Liquors, 128 Mass. 72; Our House, No. 2 *v.* State, 4 Greene, 172; Santo *v.* State, 2 Iowa, 165. See State *v.* Wheeler, 25 Ct. 290; Commonwealth *v.* Matthews, 129 Mass. 485, 487.

[2] Ellis *v.* Goodnow, 40 Vt. 237; Webster *v.* Adams, 58 Me. 317; Hooton *v.* Gamage, 11 Allen, 354.

[3] Greenman *v.* Fox, 54 Ind. 267; Ohio & Miss. R. R. Co. *v.* Alvey, 43 Ind. 180; Barton *v.* Albright, 29 Ind. 489; Schoppenhaust *v.* Bollman, 21 Ind. 280; Shetler *v.* Thomas, 16 Ind. 223; Adams *v.* Filer, 7 Wis. 306; Ross *v.* Pitts, 39 Ala. 606; Gunn *v.* Howell, 35 Id. 144; Allen *v.* Watt, 79 Ill. 284; Anderson *v.* Young, 21 Pa. St. 443; Ladd *v.* Jacobs, 64 Me. 347; Brown *v.* Dudley, 33 N. H. 511.

[4] Oppenheim *v.* Pittsburgh, Cin. & St. Louis R. R. Co. 85 Ind. 472.

[5] Stout *v.* Woods, 79 Ind. 108; Reed *v.* Whitton, 78 Id. 579; McAlpine *v.* Sweetzer, 76 Id. 78; Hume *v.* Conduitt, Id. 598; Muncy *v.* Joest, 74 Id. 409; Mavity *v.* Eastbridge, 67 Id. 211; Presler *v.* Turner, 57 Id. 56; Smith *v.* Dixon, 58 Iowa, 444.

Only executed garnishment judgments can be interposed against suits for the same debt, after the time for execution has passed. When the garnishee has not satisfied, and is no longer required to satisfy, such judgment, there is no obstacle to the subsequent suit.

Voluntary payment to the attaching creditor will not screen the garnishee from his debt to his own creditor.[1] And it may be deemed voluntary, should he have legal ground for resisting the execution, yet fail to use it—especially if the principal debtor is absent. So, too, when he pays without a bond from the plaintiff to restore to the defendant upon his appearance within a year and a day, when the law retains that feature of foreign attachment.[2]

Paying when not obliged to pay is voluntary, and therefore no protection.[3] Payment into court before execution, under an order authorized by statute, is not voluntary. Payment may always be pleaded in protection when made under order of a court having jurisdiction to render it.[4] If the garnishee has contested the authority of the court and been overruled, he cannot be required to pay a second time on the assumption that his obedience to the order was voluntary. Error in the exercise of jurisdiction will not expose the garnishee, who pays, to repayment, though the main judgment be reversed for error after he has been compelled to pay.

When the debtor was a ward and the garnishee his guardian, notice on the latter was held to give all the information to the former which the law required, so that he was presumed to be cognizant of the trustee suit, and therefore could not deny the jurisdiction as void for want of notice and could not sue the garnishee subsequent to judgment.[5]

It has been held, though not universally, that judgment against the garnishee is a bar to a subsequent suit by the attachment-debtor, whether there has been payment or delivery there-

[1] Sturtevant *v.* Robinson, 18 Pick. 175; Home Mutual Ins. Co. *v.* Gamble, 14 Mo. 407.

[2] Meyers *v.* Ulrich, 1 Bin. 25; McPhail *v.* Hyatt, 29 Iowa, 137.

[3] Yocum *v.* White, 36 Iowa, 288.

[4] Stimpson *v.* Malden, 109 Mass. 313; Haynes *v.* Gates, 2 Head, 598.

[5] Woods *v.* Milford Savings Institution, 58 N. H. 184.

under or not; but it is a bar only at a stage when the garnishee is yet liable upon the judgment though he has not satisfied it. Obviously, if the principal defendant has appealed the attachment case and the judgment against himself is reversed, that against the garnishee, though not appealed, would cease to be a bar to a subsequent action. The true rule is that the garnishee may plead in bar what he has paid or is bound to pay.[1] Obviously he cannot thus plead in bar against any sum due the attachment debtor in excess of what he has paid or is obliged to pay to another under the garnishment judgment.[2] Nor can he so plead unless the debt paid or to be paid to another is identical with that sued upon by the attachment debtor.[3]

If the principal defendant is in court, it is his business to object to irregularities; and he cannot afterwards avail himself of his own *laches* when suing the garnishee. But, under the plea of payment, the garnishee must show legal payment; the judgment he pleads must have been one that obliged him to pay. It must have been a valid judgment.[4] The judgment may be impugned for fraudulent collusion between the attaching creditor and the garnishee.[5] It cannot be disregarded because it was rendered by a foreign tribunal.[6]

It is no payment that can be pleaded in bar of a subsequent suit, when the garnishee has merely credited the garnishor upon his books and debited the attachment-debtor to the same amount, after he has been charged in a garnishment proceeding.[7] It is not enough to bar a subsequent suit by his immediate creditor for the garnishee to plead the order charging him, or even to

[1] See, on this subject, McAllister *v.* Brooks, 22 Me. 80; Sessions *v.* Stevens, 1 Fla. 233; Brown *v.* Somerville, 8 Md. 444; Cheongwo *v.* Jones, 3 Wash. C. C. 359.

[2] Tams *v.* Bullitt, 35 Pa. St. 308; Baxter *v.* Vincent, 6 Vt. 614; Barton *v.* Albright, 29 Ind. 489.

[3] Harmon *v.* Birchard, 8 Blackf. 418; Sangster *v.* Butt, 17 Ind. 354.

[4] Ohio &c. R. R. Co. *v.* Alvey, 43 Ind. 180.

[5] Seward *v.* Heflin, 20 Vt. 144.

[6] Balt. & Ohio R. R. Co. *v.* May, 25 Ohio St. 347; Morgan *v.* Neville 74 Pa. St. 52; Noble *v.* Thompson Oil Co. 69 Id. 409; Gunn *v.* Howell, 35 Ala. 144; Wigwall *v.* Union C. & M. Co. 37 Iowa, 129; Barrow *v.* West, 23 Pick. 270; Meriam *v.* Rundlett, 13 Id. 511.

[7] Wetter *v.* Rucker, 1 Brod. & Bing. 491.

plead final judgment against him in the garnishment, after the main suit has been completed and the judgment against the attachment debtor executed; there must also be a plea showing that the garnishment judgment has been executed or is still to be executed, as before remarked; and therefore, both judgments —that against the garnishee and that against the principal debtor are necessary to constitute a bar. For the former is merely hypothetical, however positively it may be written; it is dependent upon the main decree, and must stand or fall with it.

It has been held that the discharge of the garnishee may be pleaded in bar to an action by the garnishor for injury sustained by reason of a false and fraudulent answer resulting in the discharge.[1] There are reasons, however, against such holding. The limited scope of the examination under the statutes of many States; the rule under others that the trustee must be discharged when he does not affirmatively show liability, without having his disclosure tested by traverse; the practice, under all the statutes, precluding the investigation of complicated accounts and unliquidated obligations, suggest many circumstances under which a dishonest garnishee may wrong the garnishor by his answers, with perfect impunity so far as the attachment proceedings are concerned. For every wrong there should be a remedy; and the attaching creditor ought to have his subsequent action against the garnishee when he has no other means of redress.

The garnishee cannot plead judgment and payment in bar to a suit brought by one who was not a party or privy to the attachment.[2] The reason is the same as that applicable to any personal judgment—the garnishment being always personal in its relation to the garnishee. The fact that it is otherwise in other relations cannot affect the plea in bar to the suit brought by one not a party to the former proceedings.

[1] Lyford *v.* Demerritt, 32 N. H. 234.

[2] Cooper *v.* McClun, 16 Ill. 435; Lawrence *v.* Lane, 9 Id. 354; Wilson *v.* Murphy, 45 Mo. 409; Dobbins *v.* Hyde, 37 Id. 114; Funkhouser *v.* How. 24 Id. 44; Wise *v.* Hilton, 4 Me. 435; Miller *v.* McLain, 10 Yerg. 245.

Discharge in one proceeding is no bar to another by a different creditor, though the property or credit of the same defendant be the subject of the inquiry.[1] But the rule is otherwise when there has been final judgment and payment; manifestly, a second attaching creditor could not then subject the garnishee to a repayment of the same debt.[2] And this is true, though the first attachment and garnishment may have been irregular.[3] Exception to the rule has been recognized. The maker of a promissory note, after having paid it to the creditor of the payee under an order charging him as garnishee of that creditor, was not able to bar a subsequent suit against him on the note. There had been a transfer to the first indorsee, which the garnishor had attacked for fraud. The second indorsee instituted the subsequent suit; and it was held that it could be maintained; that though the plaintiff had had notice of the garnishment proceeding, yet his rights were not thereby affected as he was not a party to the proceeding.[4]

Judgment and payment constitute no bar to a subsequent suit by an assignee against the garnishee if the latter knew of the assignment and failed to disclose it to the court, and thereafter continued to withhold the fact till final judgment and payment followed the charging order.[5] To cut the garnishee off from the benefit of the plea, there must have been *laches* on his part sufficient to amount to an estoppel. Withholding the fact in fraud, and in collusion with the attaching creditor or the defendant, would and should always deprive him of the benefit of the plea; but it is held that failure to disclose is fatal to him, though there may have been no fraud or collusion.[6] If however the assignee himself has misled the garnishee into such

[1] Breading *v.* Seigworth, 29 Pa. St. 396.

[2] Watkins *v.* Cason, 46 Ga 444.

[3] Howard *v.* McLaughlin, 98 Pa. St. 410. See McDonald *v.* Simcox, Id. 619.

[4] Holland *v.* Smit, 11 Mo. App. 6.

[5] Casey *v.* Davis, 100 Mass. 124; Greentree *v.* Rosenstock, 61 N. Y. 583; Prescott *v.* Hull, 17 Johns. 284; Smoot *v.* Eslava, 23 Ala. 659; Seward *v.* Heflin, 20 Vt. 144; Marsh *v.* Davis, 24 Id. 363; Dawson *v.* Jones, 2 Houston, (Del.) 412.

[6] Field *v.* McKinney, 60 Miss. 763; Smith *v.* Blatchford, 2 Ind. 184; Kimbrough *v.* Davis, 34 Ala. 583; Foster *v.* White, 9 Port. 221.

entanglement, the latter is entitled to relief from the injustice of subjection to second payment.[1]

If there is no fault on the part of the garnishee; if he has made disclosure of the assignment at any time before he was required to pay into court, no action will lie against him by the assignee. The order charging him may have been erroneous but he is not to suffer for the court's fault.[2]

When the maker of a note is garnished, and final judgment is rendered against him before he has had notice of the assignment of the note, he may plead the judgment in defense to a suit by the assignee.[3]

Sec. 8. Suits between Various Parties.

Action lies for damages suffered by reason of illegal attachments, and the suit may be brought on the attachment bond against principal and sureties, or there may be a common-law action. This subject, with respect to both actual and exemplary damages, has been already treated.[4]

Action lies against the officer who attaches the debtor's property without lawful authority to do so.[5] Such suit is usually for trespass; and if the wrong complained of is charged to have been done under color of official function—under a writ

[1] Wentworth *v.* Weymouth, 11 Me. 446; McAllister *v.* Brooks, 22 Id. 80; Wood *v.* Partridge, 11 Mass. 488; Perkins *v.* Parker, 1 Id. 117; Comstock *v.* Farnham, 2 Id. 96; Foster *v.* Sinkler, 4 Id. 450; Dix *v.* Cobb, Id. 508; Jones *v.* Witter, 13 Id. 304; Warren *v.* Copelin, 4 Met. (Mass.) 594.

[2] Cottle *v.* American Screw Co. 13 R. I. 627; Canaday *v.* Detrick, 63 Ind. 485.

[3] Covert *v.* Nelson, 8 Blackf. 265; Cornwell *v.* Hungate, 1 Ind. 156; Rooker *v.* Daniels, 5 Id. 519; Shetler *v.* Thomas, 16 Id. 223; Sckoppenhast *v.* Bollman, 21 Id. 280; Richardson *v.* Hickman, 22 Id. 244; King *v.* Vance, 46 Id. 246. In the last case it was held that the maker may be garnished before the note is due and that the judgment is payable when the note becomes due, overruling the case of the Junction R. R. Co. *v.* Cleneay, 13 Ind. 161.

[4] *Ante*, Ch. XIV.

[5] Bentley *v.* White, 54 Vt. 564; Marqueze *v.* Southeimer, 59 Miss. 430; Patton *v.* Garrett, 37 Ark. 605; Swan *v.* McCracken, 7 Lea, 626.

however invalid, both the officer and the sureties on his official bond may be sued together.[1]

The sheriff is liable to suit for injury done through his fault to the attachment-defendant's property while it is in his official custody, though it may have been lawfully detained. That defendant is the injured party when such wrong is done, whether he gain the attachment suit or not. He is entitled to have his attached property well preserved and cared for, so that it will sell for its full value and pay as much of his debt as possible, should judgment go against him; and he is entitled to have it returned in as good condition as it was in when seized, in case the result of the attachment suit should be favorable to him. If the attaching creditor should withdraw his suit or abandon the attachment, the right of the alleged debtor to be reimbursed by the sheriff for loss caused by fault of that officer in seizing and keeping the property under the writ, would be equally clear.[2]

The officer may sue upon the indemnity bond given to secure him in attaching, if he has been mulct in damages for executing the writ upon property pointed out by the attaching creditor. He may call the creditor as warrantor into the suit for damages for executing the writ under such circumstances. This topic has already come under notice.[3]

Action lies against the officer for not attaching when it is his duty to attach.[4] He is liable for taking too little when he may secure enough to cover the debt sued upon.[5] He is liable for unnecessary delay when the attaching creditor is thereby injured.[6] He is responsible if his return is so defective in the description of the property attached as to render the

[1] Lammon *v.* Feusier, 111 U. S. 17; State *v.* Jennings, 4 Ohio St. 418, 423; U. S. *v.* Hine, 3 MacArthur, 27; Becker *v.* Dunham, 27 Minn. 32; Carpenter *v.* Dresser, 72 Me. 377. See authorities, *ante*, pp. 187, 188, and, *pro* and *con*, p. 551, 552.

[2] Becker *v.* Bailies, 44 Ct. 167.

[3] *Ante*, pp. 147, 148.

[4] Ranlett *v.* Blodgett, 17 N. H. 304; Ball *v.* Badger, 6 Id. 405; Marshall *v.* Hosmer, 4 Mass. 63.

[5] Ransom *v.* Halcott, 18 Barb. 56; Howes *v.* Spicer, 23 Vt. 508.

[6] Whitney *v.* Butterfield, 13 Cal. 335.

attachment nugatory.[1] The same is true for injury caused by any wrong done by the return.[2]

The sheriff may be sued by the attaching creditor for not exercising due diligence in the keeping of attached property if he thus causes injury to the latter.[3] Should he deliver the property to a junior attacher he would become liable to the senior.[4]

When a second attachment has been laid in the sheriff's hands, he cannot deliver the attached property to the defendant by direction of the first attacher without rendering himself liable in damages to the second attacher. The dismissal of the attachment and of the suit itself by the first attaching creditor can have no effect upon the rights of the second creditor, acquired before the release.[5]

The attaching officer is bound to replevy attached property taken from his custody, and action lies against him for failure to do so.[6] In New York, the sheriff must sue the garnishee, for the sum attached in the hands of the latter, when it has not been paid over, without awaiting the determination of the action or for an order of court.[7]

The sheriff would be accountable should he pay over to the attaching creditor funds deposited under order of court by the garnishee in case the principal suit should be decided in favor of the defendant on appeal operating as a *supersedeas*. He would be accountable either to the garnishee or to the defendant—to whichever might be rightfully entitled to the possession of the fund in any case. And for any action of the sheriff by which the garnishee should be wronged, it is obvious that

[1] Pond *v.* Baker, 55 Vt. 403, and other cases cited *ante*, p. 256.

[2] Haynes *v.* Small, 22 Me. 14; Sawyer *v.* Curtis, 2 Ashmead, 127.

[3] Becker *v.* Bailies, 44 Ct. 167, and other cases cited *ante* p. 280, n. 1.

[4] Cordman *v.* Malone, 63 Ala. 570; Scarborough *v.* Malone, 67 Id. 570.

[5] State *ex. rel. v.* Baldwin, 10 Bissel, 165. In this case, the second attacher proceeded to get judgment against the defendant in attachment, and an order for the sale of the attached property, after the first attacher had "dismissed his action and attachment."

[6] Wood *v.* Bodine, 39 N. Y. Sup. Court, 354.

[7] Davidson *v.* Chatham Nat. Bank, 39 N. Y Sup. Court, 138; Code Civil Prac. § § 655, 675.

an action would lie. It would be rather tedious than profitable to suggest the various circumstances under which such suits may arise.

If mortgaged chattels are attached and taken from the possession of the mortgagee by a sheriff in executing a writ of attachment, the act is unlawful, since there is thus a disturbance of rightful possession; but the mortgagee can recover from the sheriff only what is due him on the mortgage.[1] The right of the mortgagor to redeem the chattels, in such case, might be made the subject of seizure, as that of an incorporeal thing.[2]

Whoever is injured through fault of the attaching officer may recover for the injury: it may be sufficient here to note but a few circumstances in which actions lie for such cause. It has been held that if the sheriff, in executing mesne process against one partner for his personal debt, should attach and remove partnership goods and exclude the firm from possession, he would be liable to an action of trespass by the partnership.[3] Should he attach property which does not belong to the defendant, the owner may recover it with damages.[4] Should any lawful possessor, though not the owner, be disturbed in his custody by an officer making an attachment of it as the property of another person, such possessor may sue the officer for trespass.[5] It is trespass to attach anything legally exempt.[6]

If an owner, not an original party to the attachment proceedings, should intervene and claim the property attached therein, and should fail to sustain his claim, he could not afterwards maintain replevin against the officer for the same property.[7] But it is held that the giving of an indemnity bond does not deprive an intervening claimant of his right of action on the sheriff's bond.[8]

The purchaser of land cannot maintain an action against the

[1] Becker *v.* Dunham, 29 Minn. 32.
[2] Id.
[3] Sanborn *v.* Royce, 132 Mass. 594.
[4] Connor *v.* Long, 104 U. S. 229. *Ante*, p. 184, n. 2, 4, 5; p. 185, n. 1, 2.
[5] Williams *v.* Morgan, 50 Wis. 548, and other cases cited *ante*, p. 186, n. 1, 2; and p. 159, n. 2.
[6] *Ante*, p. 187, n. 2.
[7] Bray *v.* Saaman, 13 Neb. 519.
[8] Lewis *v.* Mansfield, 78 Ky. 460.

sheriff to remove a pending attachment of the property as that of the vendor, on the ground that it is a cloud upon the title; for such attachment cannot affect the rights of the purchaser.[1]

Suits against sureties resulting from attachment proceedings are very common; but in some States — as in Arkansas — the sureties on a dissolution bond are deemed parties to the attachment suit and subject to summary judgment without service of notice or process on them.[2]

[1] Wilson *v.* Kelly, 38 N. Y. Sup. Court, 75.

[2] Fletcher *v.* Menkin, 37 Ark. 206; Gantt's Dig. 406.

CHAPTER XVII.

THE REMEDY REVIEWED.

§ 1. Property Liability.
2. Reason for Attachment Laws Found in Property Liability
3. Creation of the Lien.
4. The Lien Hypothetical.
§ 5. The Lien Matured by Judgment.
6. The Lien by Garnishment.
7. Differences Reconciled.

Sec. 1. Property Liability.

The justification of the law of attachment and garnishment rests on the liability of property for the debts of its owner. The reasonableness of the remedy is found in this fact. What the debtor legally owns he does not morally have a right to own if his debt is as great as the value of his property; and, if it is less, he can morally retain only such proportion as the excess of that value over the debt bears to the debt. If he has bought an article yet has not paid the price, he ought not to retain both the property and the price; and, if he owes a debt which is not the price of some article bought, he ought not to continue to owe the debt and keep the article, if that property is his only means of paying. It is therefore true that all the property of the debtor, (exemption laws aside,) ought to be liable for his debts.

The law of attachment, founded on this primary proposition, is available to the creditor upon certain conditions. It is thus seen to be not unjust and repugnant to the spirit of jurisprudence, nor is it harsh and extraordinary except in its incipiency when property-indebtedness has not been established by evidence contradictorily adduced.

When debt is created, credit is really given in consideration of the obligor's property, or his ability to pay. Credit to a small amount may be given in consideration of the debtor's per-

sonal ability to earn wages, and confidence in his honesty to apply them to the payment of his liabilities; but this is exceptional to the general rule that the creditor looks to the property of his debtor for the security of his claim. This general rule is almost without exception when credit is given in large sums.

Since the general abolishment of imprisonment for debt, the law offers no remedy against the personal debtor considered as distinct from his property. The creditor may trust his impecunious friend, believing in his honesty, or charitably designing to aid him at all hazards, be the amount great or small; but, in the general course of business, in which payment is expected to follow the making of obligations, the creditor looks to the property of his debtor, rather than to the man; or to the property of the surety, rather than to the surety himself, for the satisfaction of the debt due him.

Property obligation may therefore be said to underlie the personal obligation of the debtor, even when no express lien or mortgage is put upon it. In the absence of such express lien, the property obligation is not legal, it is true, but the moral obligation of the debtor to devote his property to the payment of his debts, forms a proper basis for the legislator to build a lien upon the property when the circumstances are shown to be such that the creditor's successful recourse is against the property alone.

To enable us to comprehend perfectly the existence of property obligation to pay debt, and to separate the idea from that of the personal obligation of the debtor, take the case of a succession before its acceptance by the heirs. Whatever debts the decedent owed rest against the succession only. Not only those secured by express liens but ordinary debts look to the succession only for satisfaction. There is no personal debtor. The dead man owes nothing; his heirs owe nothing when they have not obligated themselves by unconditionally accepting the succession.

Leaving express liens out of the question; taking a succession which is burdened by none, let us consider ordinary debts only. Before the debtor's death, there is personal indebtedness and property indebtedness: after his death only the latter

remains. No one article of the property is specially indebted to the ordinary creditor: all the property is generally indebted to him. It cannot legally escape the liability. The heir, the administrator, the court, the State itself cannot rightfully deprive the creditor of his recourse against it. It is therefore said by jurists that the ordinary creditor has a general lien on the property of a decedent's estate. Such lien is silent, unrecorded, inferior to specific liens and not susceptible of special vindication like a mortgage; it must be enforced in a general way by a creditor without excluding the claims of other creditors; in short, such general lien is only the pre-existent property obligation made manifest by the death of the debtor.

When the heir accepts the succession which falls to him, making no conditions, putting himself fully into the shoes of the late owner, he becomes bound for all the obligations of the succession. He is not merely bound so far as the assets are sufficient to pay the debts but beyond to the full amount of the decedent's indebtedness. Wherever this rule prevails, there is both personal and property indebtedness after the unconditional acceptance of the succession by the heir; but is the property indebtedness any the less? Does the creditor lose his hold upon it by reason of such acceptance? Does the general lien become less efficient?

Clearly, the acceptance by the heir, either with or without creditors, cannot possibly affect the creditor's rights against the property of the succession. It is certain that the general lien must continue until satisfied. Here then is a plain case of a silent, general, unrecorded lien existing against property, in favor of the ordinary creditor, while the heir owes the debt as a personal obligation. If this is true, wherein does the case differ from that existing before the debtor's death? When he was the personal obligor, may there not have been property obligation also in favor of the ordinary creditor, in the nature of a general lien, though silent and unrecorded? Legally speaking, there was not: morally speaking, there was, in a sense sufficient to justify the legislator in giving the creditor a remedy against it when the personal debtor was absent, had absconded, or could not be reached by ordinary process, for any reason.

The death of the debtor forms no ground for the attachment of the property of his succession, since the law provides for the administration of his estate and for a kind of general attachment of it for the benefit of all creditors and for the adjustment of the rights of all persons in any way concerned, whether as creditors, debtors, heirs or legatees. The case of succession property is instanced here for no other purpose than to illustrate the principle that there is such a thing as property obligation recognized by the law, independent of personal obligation; that the former may exist without the latter; and that, when the latter is resupplied, the former remains unaffected.

The civil death of the debtor—his insolvency—is not a universal ground for attachment, since the State, by insolvency or bankrupt laws, may provide for a general administration of the debtor's assets, recognize a general lien in favor of ordinary creditors, and prevent the necessity for giving to any individual creditor the right to proceed by a seizure preliminary to suit. Where such a law exists, and where the debtor may procure a discharge, what is the position of his property, voluntarily or forcedly surrendered, after the date of his discharge? It owes, but he does not. The property obligation exists but the personal obligation has ceased in a legal sense, though it morally continues. Is this property obligation created by the law? No; it is merely recognized by the law. It *remains* when the personal obligation has legally ceased.

Sec. 2. Reason for Attachment Laws Found in Property Liability.

Is it not now evident, that the legislator's authorization of an ordinary creditor to proceed against property as if he were a lien-holder, rests on the idea of property indebtedness; and on the idea of a latent, silent, general lien, when the ground of attachment is the insolvency of the debtor? The justification of such an attachment law is the same as that of a bankrupt law; for, though the first authorizes special proceedings by any one creditor upon his showing by his affidavit, (or otherwise as the statutory requirement may be,) that the debtor is in insol-

vent circumstances, while the latter provides for general proceedings concerning all the creditors, yet both would be unconstitutional and repugnant to the spirit of jurisprudence; (would be indeed like taking the property of one man and giving it to another without right,) but for the underlying fact of property liability, and the pre-existence of such a state of things as fully to warrant the creation of the general lien.

Of many creditors, only one may believe that their common debtor is insolvent, and he only may make the prescribed affidavit and proceed upon his *quasi* lien till he shall have perfected it by judgment, and shall have given himself a better position than the other creditors; but the warrant of the legislator in giving him the statute right thus to proceed, seems not different from that by which the creditors altogether are authorized to proceed against the bankrupt.

The principal ground upon which writs of attachment and garnishment are authorized, is the debtor's non-residence, absence, concealment of himself, or his absconding, or his avoidance of personal service in some way. All of these may be reduced to one: the inadequacy of the creditor's ordinary remedy against his personal debtor, leaving that against the property of the debtor as the only available recourse. Since a debtor who cannot be reached by process though his property is seizable, is like a decedent who has left property, it would seem that there is, under such circumstances, nothing harsh or extraordinary in the authorization of procedure directly against the property as though in vindication of a lien.

What would be the position of an ordinary creditor, who cannot bring a personal suit against his debtor, if he were not enabled by statute to proceed against the debtor' property? It would be one of great hardship. On the other hand, is any injustice done to the debtor, who eludes personal citation, or who lives where personal citation cannot reach him, if his property is made to pay his debts? It would seem that justice is on the side of attachments, whether we contemplate the creditor's or debtor's position. And the proceeding against the debtor's property, when he is absent, or is concealed, or has absconded, or is in any way not reachable by process, is no more

harsh than when there is general administration of his estate, and payment of indebtedness, after his death.

There is a striking parallel between procedure against property after either the natural or civil death of a debtor, and attachment procedure where the first attacher has no priority of lien, as in Indiana, for instance. The probate or the insolvency proceeding having been instituted, any ordinary creditor may come forward, assert and prove his claim, take judgment and get paid wholly or in part, according to the capacity of the property to pay all creditors of his rank, after satisfying superior liens; so, the attachment proceeding having been instituted by one ordinary creditor, other ordinary creditors may assert and establish their claims, and all be paid alike *pro rata*, after mortgagees and other holders of recorded liens have been paid. The parallel is perfect, so far as the subject bears upon the justification of legislation authorizing ordinary creditors to attach their debtors' property. There are minor differences between procedure after the natural or civil death, and procedure after the absconding, etc., of the debtor; but, in both, the underlying principle is that the property abandoned by the debtor is liable when he cannot be reached; and that it is a common pledge of the creditors.

When the first attacher has preference over later attaching creditors, the principle is not materially different, though the parallel above suggested is less applicable. Statutes giving such preference, require a bond of the attacher, (there are some exceptions,) in which he, with his surety, undertakes to make good any wrongs he may do his debtor by proceeding, under his own showing, to attach the latter's property as if there were a lien already upon it to be vindicated. They require such bond and security in consideration of the harshness and injustice of the remedy authorized in case the plaintiff should abuse it by a false showing and an unwarrantable seizure. When any creditor is apprised of the debtor's situation, and is willing to swear to such facts and execute such bond as the statute requires, other creditors may not be ready to take the responsibility of doing so. Whether that is because they do not know of the debtor's situation, or because of some other reason, they

await the first attacher's action. He bears the brunt of the battle, and the tardy creditors ought not to complain because they cannot successfully claim equal rank.

In a legal point of view, his right to preference, or rather the righteousness of the statute which gives him preference, seems plain. When by actual attachment of property he has secured it by a lien susceptible of being perfected by judgment, it is just that his lien should not be rendered less effectual by reason of later attachments being made.

Junior attachers have to swear and give bond as well as the senior. Their claims, before the first attachment, stand on the same footing with his. All are then ordinary creditors; any one of them may become the first attacher. There is therefore no invidious legislation when the first lien is given to the first attacher. And, when it is once lodged upon any specific property, (though yet inchoate,) there would seem to be no reason why a later attacher of the same thing should weaken the hold of the first lien-holder by being allowed to lodge another lien upon the property of equal rank with the first.

However, whether a State favors the vigilant and first seizing creditor over the others or not, it could not justly authorize the creation of any lien at all but for the general liability of all property for the debts of its owner, existing in the absence of any legislation at all. Granted that such general liability exists, the giving of the remedy by attachment is easily vindicable; and the harshness of it is reduced to the case where attachment is wrongfully sued out; and that harshness is mollified and almost neutralized by the requirement of a bond and security from the attaching creditor in favor of the possibly injured attachment debtor.

It is frequently said that the remedy by attachment is a harsh one, unknown to the common law, and is altogether out of the ordinary course of litigation. It is harsh when unnecessarily resorted to, though the creditor may proceed within the law. It is always harsh in its precipitancy, considering that there is no pre-existing lien to warrant a sudden attack upon the property of the debtor. It is, in this respect, an extraordinary proceeding, owing its legality to statutory authorization only.

The presumption being in favor of the debtor; the *onus* being on the creditor to establish the debt and also some statutory ground for preliminary seizure, it seems a hard case that upon an *ex parte* showing, the plaintiff may proceed against the property of the defendant as that of an abscondent, absentee, defrauder and the like. Notwithstanding the bond or undertaking, by which the plaintiff is required to secure the defendant from possible injury, the remedy is still a hard one, and there is much reason for the frequent comments of the courts upon it as such, when holding plaintiffs to a strict compliance with statutes.

Sec. 3. Creation of the Lien: Attachment Creates a Specific Lien.

The relation of the plaintiff in an attachment suit to the defendant being simply that of an ordinary creditor to an ordinary debtor, at the date of the institution of the action, he has then no specific lien whatever upon the property of his debtor, whether it be in the hands of that debtor or in those of a third person. The indebtedness which he alleges has reference to no property in particular. All the property of the debtor stands liable to execution by any creditor who may obtain judgment against its owner. The creditor, when he institutes his action, occupies no better position than any other ordinary creditor. He has not even a silent lien upon any article of the defendant's property. He has no special right against credits due by others to the defendant, or against property, held by others, belonging to the defendant. Should he sue upon his claim by an ordinary action, no lien would arise before judgment obtained. Should other creditors sue the same debtor simultaneously, they would all remain merely ordinary creditors till they obtained judgment. They could then execute their judgments upon any property of the defendant, and their liens would be judgment-liens to be marshalled according to the rank of the judgments and seizures thereunder. The liens would have no reference whatever to the respective dates of the institution of the suits or of the service upon the defendant.

How arises the difference between such ordinary suits and attachment suits, with respect to the lien? In both classes, the plaintiffs are without preference right at the date of the institution of the suits: how does a lien arise before judgment in the latter class? How can an ordinary creditor, by his own act, give his claim a higher privilege than it had when first created by contract with the defendant?

The law makes the provision. It gives the remedy by attachment of property in the hands of the debtor, or garnishment of it in the hands of a third person, when the debtor by absconding, concealing himself, putting himself beyond the jurisdiction, fraudulently converting property, or other acts made grounds for attachment by statute, renders extraordinary proceedings necessary to the protection of the ordinary creditor's rights. So long as the creditor's position is not affected, nor his right to collect his dues by ordinary methods put in jeopardy, by the changed condition of things caused by the debtor himself, the extraordinary remedy is not at his command. No State could constitutionally step between two contracting parties, such as the creditor and the debtor, and create a lien in favor of the former, where no lien had been created by the contract, or by operation of law upon the contract, so long as the state of things existing when the relation of creditor and debtor first arose should remain unimpaired.

The power of the State to provide the extraordinary remedy of attachment is not arbitrary, but depends, for its exercise, upon the happening of such a state of things that a creditor might readily be wronged were he not allowed such remedy. It is to subserve the ends of justice that the State steps in between the creditor and debtor, and gives the former a lien upon such property of the latter as he may secure whenever it is likely that such property would otherwise not be forthcoming at the time of the judgment and execution. As it is a power exercised in behalf of all, and not of specified persons; as all persons who give credit understand that, in case of the debtor's absconding or otherwise creating occasion for the exercise of the unusual remedy against him, the power may be invoked; as the debtor himself, when he contracts a debt, must under-

stand this, there can be no objection to the law for want of general application. It is really the debtor who calls the lien into existence by his departure from the State or other acts or conditions giving grounds for attachment. The creditor, seeing such a state of things, makes the law applicable to such a case. He makes his preliminary proof of the necessary grounds, executes his bond so as to hold himself accountable if in the wrong, and then seizes before judgment such property of the defendant as would ordinarily be seizable after judgment.

When, however, the State says that an agent, instead of delivering property to his principal to whom it belongs, shall hold it against that principal's will, to be delivered to another at some future date in case a judgment should be rendered against the principal; or when the State says that a debtor shall not pay his debt to his creditor to whom it is due but shall withhold payment till it shall be ascertained whether that creditor is not indebted to some other person, and shall pay to that other person if so ordered by a court; and when the State says that meanwhile such other person, a stranger to the debtor, shall have a lien upon the sum thus due, it would seem an unwarrantable interference of the government with private affairs, if we considered only the agent and his principal. But when we take the case of the principal's creditor into consideration; when we think of the attaching plaintiff's position, in connection with that of the attachment defendant and the garnishee, we see that the ends of justice are promoted between the plaintiff and defendant by the garnishment process, and that the garnishee has nothing to complain of, since it matters nothing to him to whom he pays, so he gets acquittance from his liability. The creation of the lien, therefore, does injustice to no one, if the state of facts is as alleged by the attachment plaintiff.

The garnishee can have no cause to complain of the creation of a lien upon the property in his possession, in favor of the attaching creditor of the defendant, if the fact really is as stated by the attaching creditor; if the property held by the garnishee really belongs to the defendant so as ordinarily to be subject to execution after judgment; if the circumstances are such that he is bound to answer that he holds the property

but does not own it and has no claim upon it. The law does him no harm by creating a lien upon it in favor of the plaintiff, and finally requiring him to deliver the property to the officer instead of delivering it to his principal as he would otherwise be bound to do. So, if he is indebted to the defendant, and the debt is certain, free from all contingencies, and he is ready so to acknowledge, he is not wronged by the preference which the attaching creditor secures, in the nature of a lien upon it, which, when matured by judgment, is followed by an order for its payment into court for the satisfaction of the judgment, instead of payment to the original creditor of the garnishee, to whom it otherwise would have been paid. The garnishee is not wronged. He would have to pay at all events. The law merely steps between him and the original payee, and bids him pay to the payee's creditor.

Sec. 4. The Lien Hypothetical.

Were the lien thus created an absolute one, the State would transcend its rightful powers by creating it; for, upon the plaintiff's allegations and ex parte affidavit, while yet the defendant is unheard, the creation of an absolute lien would be the interpolation of a burdensome addition to the contract by which the ordinary debt was created, without the consent of one of the contracting parties. A State can no more do this than it can create a contract between two persons without the concurrence of the minds of those persons.

The lien is contingent. It cannot become certain till the happening of a very important subsequent event: the affirmance of the plaintiff's allegations after proof made, by a judgment of court. The lien often and properly has been styled inchoate,[1] but contingent is the better qualifying word. It depends upon the judicial finding of the state of facts which authorize the lien. If matured by judgment, the lien becomes perfect; rather, it now has the character of a perfect specific lien from

[1] Cooke *v.* Cooke, 43 Md. 522; Fuller *v.* Hasbrouck, 46 Mich. 78.

the date of its contingent creation.[1] If not matured by judgment; if the attachment be dissolved on any ground; if there be final judgment for defendant, then there never was any lien in favor of the plaintiff upon the property attached in the hands of the garnishee or in those of the defendant. If the plaintiff takes a personal judgment only, it has been held that the attachment lien is thus abandoned.[2]

By the law of relation, an attachment judgment retroacts to the time the property was first attached;[3] to the time it was first subjected to garnishment; so that no incumbrances put upon it by its owner since that time can have higher rank than the attaching creditor's lien. Such retroaction makes the lien perfect from its first inception as though created by the contract of the parties; as though it were a mortgage lien voluntarily put upon the property by the defendant himself. On the contrary, in case of final judgment for the defendant, there never has been any lien whatever;[4] his subsequently created incumbrances, mortgages or voluntarily-bestowed liens of any sort are perfectly good, and the plaintiff's claim has never been more than an ordinary one. Even if the attachment has been dissolved for irregularities, and the defendant still remains the debtor of the plaintiff, he is but an ordinary debtor, and has been nothing more since the inception of the suit. With such result, the contingent lien is seen to have been no lien at all: so that, if, pending the suit, the garnishee had paid his debt to the defendant, or delivered property to the defendant, he would have disturbed no lien, and would not now be liable to the plaintiff.

The retroaction is not to the date of the institution of the suit; not to the date of the affidavit or other preliminary showing; not to the issue of the process, (except in a few States,)

[1] Bates *v.* Plousky, 62 How. Pr. 429; Avery *v.* Stephens, 48 Mich. 246; Scarborough *v.* Malone, 67 Ala. 570; Field *v.* Dortch, 34 Ark. 399.

[2] Lowry *v.* McGee, 75 Ind. 508.

[3] Hill *v.* Baker, 32 Iowa, 302.

[4] Suydam *et al. v.* Huggeford, 23 Pick. 465, 470; Clapp *v.* Bell, 4 Mass. 99; Johnson *v.* Edson, 2 Aikens, 299; O'Connor *v.* Blake, 29 Cal. 312; Lamb *v.* Belden, 16 Ark. 539; Hale *v.* Cummings, 3 Ala. 398.

but generally to the exact time when property was reached by direct attachment,[1] or by service of garnishment upon a third person who really has property of the defendant in possession subject to execution in case the judgment sought should be obtained, or who owes the defendant a debt subject to collection by the attaching creditor after such judgment shall have been obtained.[2] The garnishee's affirmative answer to the question whether he has money or goods of the defendant may be made after this date, but the retroaction of the judgment is not to the time of answering but to the time of service. From the moment of service the lien is perfect—provided judgment recognizing the lien shall follow. From that moment the lien is nothing—provided no such judgment shall follow. The garnishee cannot know the future contingency. He is bound to hold the money, or goods, or indebtedness, subject to the order of court. The defendant is debarred from regaining his attached property or collecting his attached dues, till the event of the judgment shall have shown whether there is a lien or not. The plaintiff cannot enforce the lien till matured by judgment.

Sec. 5. The Lien Matured by Judgment: The Attachment Lien is Merged in the Judgment Lien.

It will now be seen that it is only a judgment lien that can

[1] Bride *v.* Harn, 48 Iowa, 151; Wright *v.* Smith, 11 Neb. 341. Arkansas may be now ranked among the exceptional States in this respect, (Bergman *v.* Sells, 39 Ark. 97,) so far as direct attachment is concerned, though not when there is attachment in the hands of third persons by process of garnishment. This has been held in exposition of Gantt's Dig. § 404, though that section does not seem to warrant very pointedly such construction. Formerly, the doctrine was that the retroaction was only to the time of the levy; so that there was no prior lien: Merrick *v.* Hutt, 15 Ark. 343; Lamb *v.* Belden, 16 Id. 539; Frellson *v.* Green, 19 Id. 376.

[2] Fitch *v.* Waite, 5 Conn. 11; Gates *v.* Bushnell, 9 Id. 530; Sewell *v.* Savage, 1 B. Monroe, 260; Nutter *v.* Connett, 3 Id. 199; Zeigenhagen *v.* Doe, 1 Ind. 296; Tafts *v.* Manlove, 14 Cal. 47; Kuhn *v.* Graves, 9 Ia. 303; Stockley *v.* Wadman, 1 Hous. (Del.) 350; Pond *v.* Griffin, 1 Ala. 678; Haldeman *v.* Hillsborough and Cin. R. R. Co. 2 Handy, 101; Crowninshield *v.* Strobel, 2 Brevard, 80; Robertson *v.* Forrest, Id. 466; Bethune *v.* Gibson, Id. 501; Crocker *v.* Radcliff, 3 Id. 23; McBride *v.* Harn, 48 Iowa, 151; Stiles *v.* Davis, 1 Black, 101; Kennedy *v.* Brent, 6 Cr. 187; Hacker *v.* Stevens, 4 McL. 535.

be enforced against the property attached, or garnisheed in the hands of the defendant's debtor or property holder. What better position does the attaching creditor occupy after judgment, than he would have were he only an ordinary judgment creditor? None whatever, if he is the only creditor, and if the defendant has been duly summoned or has appeared, and if the property has remained subject to execution. What then was the use of the attachment or garnishment? The only use in such personal suit was to preserve the property so as to have it forthcoming in case of judgment, and so as to prevent other creditors from getting the advantage by prior judgments and seizures.

The attachment lien is therefore nothing without judgment; and, upon judgment being rendered, it is lost in the judgment. It is the judgment lien which is enforced. The retroactive character which the attachment or garnishment gives to the judgment is, then, the only distinction between this and an ordinary judgment.

And so far as garnishment is concerned, it will serve the plaintiff's purpose as well, in a personal action, if made after judgment, if he could be certain that the third person would not deliver what he holds, or pay what he owes, to the defendant, before the decree could be rendered.

The law, (rather, the State,) does no arbitrary and tyrannical thing then, when it creates such a contingent lien as that above described, without the consent of contracting parties. It merely aids justice. It steps between the defendant and his debtor or the custodian of his property and says, "Let matters stand as they are till it shall be judicially ascertained whether the plaintiff's sworn statement is true. If true, he ought to be paid; and your property, defendant, ought not to be spirited away meanwhile, as he swears it is likely to be, if you are not prevented from putting it or yourself out of his reach. And you, garnishee, must hold on to what you have, till the plaintiff shall prove up his case to the satisfaction of the court, and then pay to the plaintiff if the court shall so direct, and you shall have acquittance of your obligations to the defendant."

If, by thus stepping in between the parties, the State enables

the plaintiff to do any wrong to an honest defendant who really does not owe the claim preferred against him, such wrong is done at the instigation of the plaintiff, and he is liable to be made pay for whatever damage may result. If, on the other hand, the condition of things is such as his sworn statement sets forth, it is the duty of the State to help him from being swindled by an absconding or otherwise debt-avoiding defendant.

The lien is peculiar and exceptional in this: it comes into existence by the seizure made to enforce it. Ordinarily, the *jus ad rem*, the right in the thing to the amount of the debt, must exist before seizure, since otherwise there would be no right to seize. The mortgage-lien must exist before there can be any seizure of the mortgaged property to enforce it; the seaman's lien for wages must rest upon a ship before it can be seized in vindication of the right; all admiralty liens must have arisen before there can be any procedure to enforce them; all liens of any character must have a being before they can have any judicial vindication, except the attachment lien.

The law allows the ordinary creditor to become a lien holder by making a seizure without having a specific pre-existing lien. The attaching creditor has no *jus ad rem* before he attaches, but he attaches as though he had such right and were proceeding to enforce it. The proceeding is anomalous. It is none the less so because of the contingent character of the lien thus exceptionally created. No alleged lien can be enforced, in case the judgment should be in favor of the defendant. There is nothing in the inchoate or uncertain nature of the attachment lien prior to trial that will excuse the novel method of its creation. The only justification is in the fact that the ends of justice are subserved.

This exception to the general rule of law concerning liens is based upon public policy, and upon the necessity of giving the creditor some adequate remedy if the condition of things is such as he affirms in his declaration and affidavits. Because it is extraordinary and anomalous, the law requires of him a bond by which he binds himself to answer for any damage he may cause the defendant. And, where the garnishee is liable to be injured by the process against him, he is protected by like

bond—that is, where the garnishment proceedings are separate and constitute an ancillary suit.

The lien, merely hypothetical, can result in harm to no one (except what may be incident to the delays of litigation,) if the sworn statement of the plaintiff is true and statutory; and, if untrue or illegally made, the remedy for any wrong done is at hand, and the bond given by the plaintiff is the best protection to the injured party that the law could vouchsafe. Such lien does not burden the garnishee's debt to the defendant; that is, the defendant does not become a lien-holder in relation to his debtor. The fact that the attachment creditor, through the defendant, reaches the garnishee and becomes a lien-holder with respect to the property held or debt owed by the garnishee, does not put the latter in any worse position than he occupied before.

When the attaching creditor files his declaration and affidavit he is so far from having a lien upon any property of the defendant that he has not any specific property in view. His purpose is to have any property of the defendant attached, in amount sufficient to secure his claim. Any one of many articles of personal property might prove sufficient, but the pleadings describe no one of those articles and have special reference to no one of them. So, when he causes the summons to issue to a third person, he has reference to any property which such person may have in possession as the property of the defendant, liable to execution when judgment shall have been obtained but he has no reference to any particular thing and makes no description of any. Or, if he believes that such person owes the defendant a debt liable to the process of garnishment, he describes no particular debt, and the process performs its mission when it reaches any debt sufficient to satisfy the plaintiff's demand. There is therefore no specific lien created by the mere filing of the declaration and affidavit; and, as there was none pre-existing to be enforced, the plaintiff yet remains a mere ordinary creditor. For, there is not only no specific lien yet created, but there is no general one. The plaintiff has not yet a preference over other ordinary creditors. Proceedings filed later than his may possibly acquire a lien in advance of his.

When service has been made upon the defendant, and property of his, in his possession, has been attached and taken into the legal custody of the seizing officer, a hypothetical lien is created. Is it a general or a specific one? The writ of attachment is general, so that the officer is authorized to seize any property of the defendant which is liable to execution, but the attachment itself is specific. What is actually attached is subjected to the hypothetical lien and that only. What is actually attached is treated as though the plaintiff had had a *jus ad rem* with reference to it when he caused the writ to issue; as though the court had ordered the seizure of that particular property; as though a lien upon it had been held by the plaintiff prior to the institution of the suit. The seizure and the right to seize; the movement for the enforcement of the lien and the creation of the lien, take place at the same time.[1] The dissolution of the attachment thereafter would be the destruction of the lien; the completion of the enforcement would be the perfection of the lien—rather, the judgment sustaining the seizure would perfect the lien, so that it would be no longer hypothetical.

Two things therefore must concur to create an attachment lien: service upon the defendant or his appearance, or his notification, and an actual or constructive seizure of specific property of his liable to execution.

The attachment being to aid execution, though made at the first stage of the proceedings, must be effectual so as to have the attached property forthcoming when required after judgment, and so as to prevent rival creditors from securing hypothetical liens, in their own favor, of prior rank. Therefore, whatever is requisite to hold the defendant's attached property for final execution, as against both the defendant and any rival creditor, is to be observed when the lien is created. Whatever is necessary to a valid seizure after judgment in ordinary exe-

[1] Brown *v.* Williams, 31 Me. 403; Wilson *v.* Forsyth, 24 Barbour, 105; Am. Ex. Bank *v.* Morris C. & B. Co. 6 Hill (N. Y.) 362; Brown *v.* Williams, 31 Me. 403; Stephen *v.* Thayer, 2 Bay, 272; Martin *v.* Dryden, 6 Ill. 187; Redus *v.* Wofford, 4 Smedes and M. 579; Tappan *v.* Harrison, 2 Humphreys, 172; Lackey *v.* Seibert, 23 Mo. 85; Hannahs *v.* Felt, 15 Ia. 141; Cockey *v.* Melne, 16 Md. 200; Bagley *v.* Ward, 37 Cal. 121.

cution, is necessary in making the attachment. For attachment is a seizure in execution before-hand; a preliminary step in the enforcement of an ordinary judgment by an ordinary judgment-creditor, in contemplation of such judgment being rendered *in futuro;* a step in advance towards execution, of such a character that it must be retraced, and all wrong done by it indemnified, in case such advance shall prove to have been wrongfully made. It is a defeasible right which the law gives in consideration of the preliminary proofs by the plaintiff to show his right to obtain judgment and to execute it.

As, when an ordinary judgment is annulled the writ for its execution becomes void, so when no judgment follows the service of an attachment writ and the seizure thereunder, the writ and seizure give the attaching creditor no rights, and he remains without a lien.

Sec. 6. Lien by Garnishment.

To create a lien by garnishment, in a personal suit against the defendant, he must be notified, the garnishee must be summoned and the property or credits of the defendant in the garnishee's hands must be attached. So soon as both the defendant and the garnishee have been served, there is a general, hypothetical lien upon all that the garnishee owes the defendant when the process has reference to indebtedness; or upon all property of defendant, in possession of the garnishee, liable to execution, when the process has reference to property; or upon both, when there is reference to both. Such general lien is good to the extent that the garnishee, before answering and specifying the particular property or debt, cannot make way with such assets of defendant, nor pay or deliver to him; and it is good to prevent any other creditor from getting the advantage by obtaining the earlier answer and securing a prior specific lien. It is not, however, till the answer has been made, and particular property or debt attached in the garnishee's hands, that any specific, hypothetical lien is known to have been created. If the answer should show the possession of several articles of property or of several debts due the defend-

ant, one of which would be amply sufficient to secure the execution of any judgment the plaintiff could obtain under his pleadings, the other articles would not be held specifically subjected to any lien, nor generally so subjected, after the attaching creditor had selected and pointed out the one to be attached in the garnishee's hands. The others would then remain liable to garnishment by other creditors; or, in the absence of such process by them, the unattached goods might properly and legally be delivered to the defendant or the debts paid to him. This obvious consideration shows that the general lien temporarily existing between service and answer was merely precautionary to secure the plaintiff's right, under the law, to create a specific lien of hypothetical character to ensure the execution of his judgment in case he should ever acquire any to the perfection of his lien. In other words, the temporary hold on all the property of the defendant in the hands of the garnishee was the first step, and the specific right to execute certain property whenever he should be entitled to execution,—both were preliminary to the creation of a judgment-lien and to the making of such judgment-lien effectual.

It will be understood, without the saying of it, that when the garnishee has nothing and so answers, and the plaintiff acquiesces in the answer, making no traverse and offering no evidence *aliunde*, the fact appears that there was no general lien created by the service of the garnishee and defendant; nor could any specific one result.

It becomes a matter of great importance that the precise time of the fastening of the lien upon property of the defendant, either in his hands or that of the garnishee, should be fixed, when there are competing attaching creditors. Where no fraction of a day is recognized with regard to the attaching of property, the precise hour and moment are not important; but where, as in most of the States, priority is nicely dependent upon the time of attaching, reckoned by the hour and minute, it is of the first importance that the return should show when the service was made and when the lien was created. If several attachment liens, in favor of several independent creditors respectively, are simultaneously created, they are all of equal

rank. The garnishee, served at the same moment in all the cases, is bound to all the several plaintiffs alike, though his answers should be rendered at different times in the several cases. The priority would be reckoned, not by the time of answering but by the time of summons—assuming that the answer would be the same in all the cases and sufficient to hold the property or debt in every case. Under such circumstances, the several attaching creditors are all upon equal footing, and should share *pro rata* the assets garnisheed, in case all succeed in maturing their liens by judgment.

Suppose all should summon the garnishee simultaneously, but some one should be in advance of the rest in getting service upon the defendant: would that one's lien outrank those of the rest? In a personal action of attachment, the citation of the defendant is necessary to the suit. The creditors who should summon the garnishee before the existence of the main cause, would be at a disadvantage compared with a competing creditor who has brought the principal defendant into court, and then summoned the garnishee. Although ordinarily, after the writ has been issued against the defendant but not yet served, a creditor may summon the garnishee, and the defendant would not be allowed to defeat the garnishment by pleading that the summons was premature, the question might be a very serious one, among competing attachers, whether such premature summons would hold good against one made by another creditor who had already brought the principal defendant into court. Where one or the other of two attaching creditors must fail, it would seem that under such circumstances, the one who had had the principal defendant served before summoning the garnishee, would be entitled to priority of lien over the property subjected to garnishment, though the two summons had been simultaneously served upon the same garnishee.

If the plaintiffs in several attachment, personal suits against the same defendant should all simultaneously have him served and brought into court, and then all should sue out garnishments simultaneously against the same garnishee to attach in his hands the same property, the first service of summons upon the garnishee would give preference to the creditor causing it

to be made, over the later services. True, all being in the hands of the same officer, all should be served simultaneously; true, any partiality shown by the officer to one attacher above the rest would subject him to damages; but, in case there should be priority of service in any one of the cases, there would be a corresponding priority of lien.

It may be said that the service of the writ of attachment upon the defendant creates no lien so long as there is nothing really attached; but under the circumstances above supposed, where several creditors simultaneously have one defendant served with such writ, the one who should get service thereafter first upon the garnishee would have priority of specific lien upon the property which such garnishee should afterwards acknowledge to possess, belonging to the defendant.

The above suggestions have been made on the assumption that the garnishee would answer alike in all the simultaneous garnishment cases, and disclose a state of facts sufficient to charge him. He should make known the fact in each that he had been garnished in the other cases, for the sake of his own protection. But, if he should answer differently in the several cases; acknowledging indebtedness to the defendant in one but denying it in another; acknowledging the possession of the defendant's property in one, but denying it in another, the final result would be the same; for those who receive the negative answer would be sure to traverse it, and the proof to set it aside and hold the garnishee would be ready at hand in the affirmative answers given, provided the interrogatories were equally pointed and directed to the elicitation of the same facts. The lien would not be later in creation by reason of such tergiversation on the part of the garnishee, and the defendant could take no advantage of the delay in bringing out the truth. Of course, if the answers were such, in all the cases, as to result in the discharge of the garnishee, all the creditors would fare alike, and there would be no lien created by the garnishments, and the attachment part of the suit would be at an end, if nothing had been seized in the defendant's hands.

Under the rule that formerly prevailed in Massachusetts, that the garnishee, (or trustee) must be held accountable unless

sufficient appeared in his answer to discharge him,[1] the liability was personal to him, in case he really had nothing of defendant's property in his possession, since there could be no lien where there was nothing for it to rest upon, and since the law is universal that garnishment creates no lien upon the garnishee's own property. The opposite rule now prevails—that the garnishee must be discharged if he do not disclose facts to hold him, and if such facts are not shown by other proof.[2] In cases of doubt he ought to be discharged. If the plaintiff does not think his interrogatories fairly answered, he may, through the court, compel fair answers. If he finds the interrogatories themselves inadequate to draw out the required state of facts, he may apply for leave to amend them, or to serve another set upon the garnishee. If, by reason of prevarication or double-dealing, or collusion with the defendant, or other bad practices, the garnishee should subject himself to liability when he really has no property in hand subject to garnishment, the plaintiff acquires a right against him but no lien upon any property whatever by reason of such practices.

Property, subjected to the attachment lien by reason of garnishment, remains in the garnishee's hands so long as the lien continues to be merely contingent, inchoate or hypothetical. It is considered under seizure, and the garnishee is, during this period, the legal custodian of the lien-bearing property, as much so as a sheriff's keeper of property actually seized by that officer. It is essential to the maintenance of the lien that the property be held virtually under arrest. While it is in the garnishee's hands, and the attachment proceedings are pending, it is constructively in court. The custodian is subject to the orders of the court respecting it, except that he cannot legally be ordered to deliver up the property so long as the lien remains merely hypothetical. He cannot voluntarily give it up to the court or to the court's officer, without rendering himself liable to the defendant in case the attachment should be dissolved, or

[1] Tabor *v.* Armstrong, 4 Mass. 206; Cleveland *v.* Clap, 5 Mass. 201; Hatch *v.* Smith, *Id.* 42; Gordon *v.* Webb, 13 Mass. 215.

[2] U. S. *v.* Langton & Trustees, 5 Mason, 280.

there should be judgment for the defendant, and there should be any injury done to the defendant by such voluntary, premature delivery to the court.

Whatever dissolves the attachment annuls the garnishment *ab initio*, so that it may be seen that no lien whatever has existed by reason of the summons of the garnishee, his affirmative answer and even the order of court deciding that he is liable under his answer.

The hypothetical lien may be created by garnishment,[1] and publication notice to the absent debtor who cannot be served personally or by citation left at his domicile. Ordinarily, seizure by the officer and actual taking into possession of property belonging to the debtor, with publication notice to the absent owner, and proper pleadings against the thing seized, are proceedings *in rem:* is there any difference if the thing be seized in the hands of a third person who is lawfully in possession and who is allowed to retain it as keeper until the lawfulness of the plaintiff's claim shall have been judicially ascertained? In case of an attachment proceeding *in rem*, without garnishment, the hypothetical lien arises upon seizure and publication; is there any difference when the thing attached is in the hands of a third person and is left in his hands subject to garnishment? There is none. The great significance which the law of the property action ascribes to the actual taking and keeping of the *res* as the fictitious defendant in the cause, does not imply that the continued possession of the *res* attached may not be by the garnishee; for he is in some sense an agent of the court under such circumstances. Should the result of the litigation be such as to mature the lien, then it is seen that he has been holding for the court since the date of his summons. His actual possession has been the court's constructive possession.[2] The sheriff or marshal, (as the case may be,) has

[1] Renneker *v.* Davis, 10 Rich. Eq. 289; Wilder *v.* Weatherfield, 32 Vt. 765; Swett *v.* Brown, 5 Pick. 178; Tindell *v.* Wall, Busbee, 3; Thompson *v.* Allen, 4 Stew. & Porter, 184; Hicks *v.* Gleason, 20 Vt. 139.

[2] Erskine *v.* Stanley, 12 Leigh, 406; Walcott *v.* Keith, 2 Fos. 196; Stiles *v.* Davis, 1 Black, 101.

held the property all the while through the garnishee as keeper under the court, though the sheriff has not appointed such keeper and is not responsible.

It has been thought that garnishment does not create a lien upon the property attached in a third person's hands but only creates the right of holding him responsible for its value.[1] This position is wholly untenable. The very object of attachment is to create a lien; and if none is created, there can be no available attachment. The suit might exist against the principal debtor as a personal one, but there could be no attachment suit for want of a *res*. If the defendant is not served and does not appear, against what would the suit be directed?

It is true that property or credit attached in the hands of the garnishee, remaining in his hands as custodian under the court, may easily be put out of the reach of the attaching creditor so as to make him unable to enforce his lien against that specific thing; but the difficulty of such enforcement is no argument against the validity of the lien. If garnishment creates the *right* of holding the garnishee responsible for the value of what has been attached in case he should spirit it away before it is wanted for execution, that is precisely such right as the creditor has against the defendant himself who has received the *res* under a forthcoming bond and then made way with it. This right is a lien right. It is such a right as will enable the attaching creditor to restrain the garnishee from such disposition of the property or credit as would prevent its execution.[2]

It is certain there can be no attachment suit against a thing, (in which there is no personal defendant,) unless the thing is under arrest so that it can be condemned. It is certain that the court, having no jurisdiction over its owner, (who has not been cited as defendant and cannot be,) can have none over his property as a thing indebted by fiction of law, unless it has

[1] See Bigelow *v.* Andress, 31 Ill. 322; Walcott *v.* Keith, 2 Fos. 196; Johnson *v.* Gorham, 6 Cal. 195; Moore *v.* Holt, 10 Gratt. 284.

[2] Moore *v.* Kidder, 55 N. H. 488; Parker *v.* Parker, 2 Hill Ch. 35; Parker *v.* Farr, Browne, 331; Aldrich *v.* Woodstock, 10 N. H. 99; Loyless *v.* Hodges, 44 Ga. 647. See Bigelow *v.* Andress, 31 Ill. 322.

been duly seized, brought into court, and notice of proceeding against it given so that the interested debtor may appear.

On the other hand, the absence of the debtor will not prevent his creditor from garnisheeing his goods or credits in another's possession, and from proceeding *in rem* to have them made available for the payment of the creditor's demand; and yet, by the law of garnishment, the possession must not be disturbed till judgment. The possession meanwhile is either that of the garnishee in his own right, or that of the court by the garnishee as keeper. The former is the case if the proceedings should result in judgment against the plaintiff; but the latter, should the goods be condemned to pay the debt.

Attachment in the hands of the garnishee, then, is equivalent to actual seizing and taking property of the debtor, so far as to enable the court to acquire jurisdiction over the property or credit proceeded against, when there is no personal suit against the debtor.

The position of the garnishee, in such action, is not different from that in a suit of attachment, when the defendant is brought into it by summons. He is, in such property action, no more a defendant than in a personal action against the debtor. Where ancillary garnishment proceedings are separate from the principal action, this statement may not be so apparently evident; but when the debtor is not served with process but merely notified by publication, and the thing attached is the property or credit of that debtor in the garnishee's hands, the only defendant is the thing that has been subjected to garnishment, and the possessor of it is nothing more than a garnishee. In other words, whether the debtor is served with process or notified by publication, the position of the garnishee is the same. It will be seen elsewhere in this treatise that his liability to injure himself is much greater, that the question of jurisdiction concerns him more nearly; that the rights of the debtor need to be looked after by him, for his own protection, more closely, when the debtor is not present; but it is as manifest that he is merely a garnishee when the action is directly against property as it is when the attachment debtor appears personally and defends the suit. He

is a mere stake-holder in either case. He holds the stakes for the use of the winner under both circumstances.

No lien is created by the filing of the declaration and affidavit, nor by the issue of the process by the court through the clerk, nor by the placing of it in the hands of the sheriff, except in a few States. Not even an inchoate lien is thus created. Service only, in most of the States, gives it existence as an inchoate lien maturable by judgment. Service on the defendant or notice by publication, followed by attachment in the defendant's hands, or summons actually served upon the garnishee, operates upon the property or credit of the defendant in the garnishee's hands, or in the defendant's, and subjects it to the attachment lien.[1]

The sheriff ought to serve attachments and garnishments in the order of date in which he receives them. This is plainly his duty when there are several writs in his hands, each aiming to secure a lien upon one fund. And this is because the garnishment lien is an attachment lien, and because priority governs.[2]

The plaintiff can have no recourse against the garnishee after the defendant's liability has ceased by payment or otherwise. Though the garnishee may have no interest in not paying the plaintiff, provided he gets an acquittance of his obligation to the defendant; and though it is the business and interest of the defendant himself to see that the garnishment is not prosecuted after payment, yet the garnishee himself may set up that the

[1] Mattingly *v.* Boyd, 20 How. 128; Brashear *v.* West, 7 Pet, 608; Hacker *v.* Stevens, 4 McLean, 536; McCobb *v.* Tyler, 2 Cr. C. C. 199; Grigsley *v.* Love, Id. 413; Kennedy *v.* Brent, 6 Id. 187; Gates *v.* Bushnell, 9 Ct. 530; Fitch *v.* Waite, 5 Id. 117; Parker *v.* Kinsman, 8 Mass. 436; Burlingame *v.* Bell, 16 Id. 318; Burkhardt *v.* McClellan, 15 Abb. Pr. 243; Briggs *v.* Kouns, 7 Dana, 405; Pond *v.* Griffin, 1 Ala. 678; Tillinghast *v.* Johnson, 5 Id. 514; Sewell *v.* Savage, 1 B. Mon. 260; Nutter *v.* Connett, 3 Id. 199; Mears *v.* Winslow, 1 Sm. & M. Ch. 449; Bryan *v.* Lashley, 13 Sm. & M. 284; Tafts *v.* Manlove, 14 Cal. 47; Wallis *v.* Forest, 2 Har. & McH. 261; Watkins *v.* Field, 6 Ark. 391; Martin *v.* Foreman, 18 Id. 249; Williamson *v.* Bowie, 6 Munf. (Va.) 176; Crowninshield *v.* Strobel, 2 Brev. (S. C.) 80; Bethune *v.* Gibson, Id. 501; Robertson *v.* Forest, Id. 466; Crocker *v.* Radcliffe, 3 Id. 23.

[2] Talbot *v.* Harding, 10 Mo. 350; Wilder *v.* Weatherhead, 32 Vt. 765; Woodruff *v.* French, 6 La. Ann. 62; Johnson *v.* Griffith, 2 Cr. C. C. 199.

lien on the funds or property in his hands has ceased to exist, by the payment. Whatever has effected the dissolution of the attachment without the satisfaction of the debt would also dissolve the garnishment, and could be pleaded by the garnishee, who has at least the interest of being freed from further annoyance.

Even when there is not an end of the suit, if there is an end of the attachment, the garnishee can no longer be held where the garnishment is an auxiliary of the attachment process. In no case can the plaintiff make his money out of the garnishee without first obtaining a final judgment against the defendant with recognition of the attachment lien. An appeal suspends the judgment, as to its finality, and therefore suspends the collection of money from the garnishee.

Sec. 7. Differences Reconciled.

So far as statutes differ from each other, they necessitate differences in decisions which are usually reconciled by reference to the statutes which they expound; but the principles governing the attachment remedy should be applied substantially to the same effect everywhere.

The differences in decisions, not caused by variances in statutes are largely attributable to a misconception of the relation of parties or to misuse or abuse of terms employed. Though this whole treatise is largely devoted to an incidental adjustment of these difficulties, it remains to notice a few of them more particularly.

It has long been a mooted question, whether a judgment debtor can be garnished. It may be considered under two aspects: first, in relation to the judgment debtor; and secondly, in relation to the court rendering the judgment. So far as the former is concerned, there is no reason why he should not be garnished and the judgment-debt attached in his hands in a suit against the judgment creditor. He has no cause of complaint when he gets acquittance by paying to another under judicial order what he would otherwise be obliged to pay to his immediate creditor. He would have cause to complain should

he be made to pay at a time when such payment would give him no acquittance, or under circumstances which would give him no relief from the judgment. If the judgment against him is in a foreign court, or in any court other than that in which he is garnished, he should be discharged upon disclosing the existence of the judgment.

This leads to the consideration of the question in relation to the court rendering the judgment. The court, being possessed of jurisdiction, has the exclusive right of effectuating its decree by execution. No other equal tribunal can step before it and say that the judgment-debtor must pay to some person other than the judgment-creditor, without interfering with the jurisdictional power to execute the judgment rendered. If however the attachment suit is brought in the same court that rendered the judgment, there would be no clash of jurisdiction should the attaching creditor be subrogated to the right to the judgment-creditor in a suit against the latter. Chief Justice Green of New Jersey said broadly that no case is known to exist "to sustain the position that a judgment-debt is liable to attachment."[1] He qualifies his remark however, (after citing authorities which seem to go no further than to sustain the rule that such debtor cannot be ordered to pay as garnishee when such payment will not give him relief from the judgment rendered or proceeding pending against him,)[2] by saying further on in the decision he was rendering: "I am of opinion that a debt, whereon judgment has been rendered, upon which the party is liable to immediate execution, is not the subject of attachment in the hands of the garnishee, and that the principle applies with peculiar force to judgments recovered in another State."

There has been some apparent conflict of opinion upon the question of liability,[3] but nearly all, if not quite all, can be

[1] Shinn *v.* Zimmerman, 3 Zab. 150.

[2] Sharp *v.* Clark, 2 Mass. 91; Howell *v.* Freeman, 3 Id. 121; Prescott *v.* Parker, 4 Id. 170; Thorndike *v.* De Wolf, 6 Id. 170; Franklin *v.* Ward, 3 Mason, 136; Coppel *v.* Smith, 4 T. R. 312; Grant *v.* Hawding, Id. 313; Sir John Parrot's Case, Cro. Eliz. 63; Kerry *v.* Bower, Id. 185; 2 Bac. Abr. 260.

[3] *Affirmative:* Minard *v.* Lawler, 26 Ill. 301; Halbert *v.* Stinson, 6 Blackf. 398; Skipper *v.* Foster, 29 Ala. 330; Keith *v.* Harris, 9 Kan.

reconciled on the common ground that a judgment-debt may be attached and the judgment debtor garnished in an attachment suit pending against the judgment creditor when it can be done without clash of jurisdiction and without subjecting or endangering the garnishee to double payment; and that such debt cannot be attached when such conflict or injustice would result.

The term-phrase, *in custodia legis*, is frequently employed in decisions upon attachment cases in the statement of the general doctrine that property, money, debts and rights in the custody of the law are not attachable. On this general doctrine the courts are well agreed; but there have been serious differences of opinion upon exceptional states of fact. May money collected by a sheriff on execution be attached in his hands? May money held by a clerk of court,[2] register in chancery, an executor, administrator or like officer be attached under any circumstances? These have been mooted questions.

Considering funds thus held to be in the custody of the law, it has been held that they are not attachable, and that the officer cannot be garnished as the trustee of the attachment defendant.[1]

On the other hand, distinction has been made between funds held by a sheriff subject to a future order of distribution and

386; O'Brien *v.* Liddell, 10 S. & M. 371; Fithian *v.* N. Y. & Erie R. R. 31 Pa. St. 144; Belcher *v.* Grubb, 4 Harr. 461; Gager *v.* Watson, 11 Ct. 168.

Negative: Black *v.* Black, 32 N. J. Eq. 75; Elizabeth Saving Inst. *v.* Gerber, 35 Id. 159; Trowbridge *v.* Means, 5 Ark. 135; (39 Am. Dec. 368;) Tunstall *v.* Means, Id. 700; Norton *v.* Winter, 1 Oregon, 47; Trombly *v.* Clark, 13 Vt. 118, and cases mentioned in the preceding note as cited by Green, C. J.

[1] That money collected by a sheriff on execution cannot be attached in his hands: Dawson *v.* Holcomb, 1 Ohio, 275, (13 Am. Dec. 618;) Jones *v.* Jones, 1 Bland's Ch. 443, (18 Am. Dec. 327;) Prentiss *v.* Bliss, 4 Vt. 513, (24 Am. Dec. 631;) Blair *v.* Cantey, 2 Speer's Law, 34, (42 Am. Dec. 360;) Marvin *v.* Hawley, 9 Mo. 378, (43 Am. Dec. 547;) *Ex parte* Fearle & Lewis, 13 Mo. 467, (53 Am. Dec. 155). See Crane *v.* Freese, 1 Harrison, (N. J.) 305; Ross *v.* Clarke, 1 Dall. 354; Canover *v.* Ruckman, 32 N. J. Eq. 686; Davis *v.* Mahoney, 9 Vroom, 107. That a clerk of court is not garnishable for funds in his hands under like circumstances: Bowden *v.* Schatzell, 1 Bailey Eq. 360. See Note, 55 Am. Dec. 260, in which the above references and some to follow are pointed out. See also *ante*, pp. 218–220 for authorities.

those already adjudicated and due to a designated person. In the latter case, the money has been held subject to attachment in a suit against such person and the officer liable to garnishment.[1] And a register in chancery was held garnishable for a balance in his hands from a sale.[2] And the rule of distinction has been held applicable not only to the officers above named but also to clerks of court, prothonotaries, recorders, justices of the peace, constables, receivers, disbursing officers, assignees in bankruptcy, trustees of insolvent estates or corporations, city and county treasurers, executors, administrators and guardians.[3]

The difference of opinion seems to turn on the application of the phrase *in custodia legis*. The expression is figurative: nothing can be literally in the custody of the law. The custody is that of the officers of the law; and, whether such a custodian can be garnished or not depends upon the circumstances under which he holds, and his relations to the fund and to the persons interested and to the court. When litigation has ended, and the fund has been adjudicated, distribution ordered, costs settled, and nothing remains but for the officer to pay over to the person entitled to the money, is his possession still that of the law? In a sense it is; in another sense it is not. Whether the figurative phrase "in the custody of the law" may still be properly employed with reference to the fund or not, it seems sound doctrine that the general rule applicable to the non-attachability of things when in such custody no longer fits the case. It would be a manifest abuse of the term to apply it, with the general rule accompanying, in such exceptional cases. The money, after final adjudication, is no longer in legal custody for the purpose of judicial action, though it may be said to be still in such custody for the one remaining purpose of being paid to the rightful owner. By noting this distinction,

[1] Hurlburt *v.* Hicks, 17 Vt. 193, (44 Am. Dec. 329;) Tucker *v.* Atkinson, 1 Humph. 300, (34 Am. Dec. 650;) King *v.* Moore, 6 Ala. 160, (41 Am. Dec. 44:) Hill *v.* Beach, 1 Beas. 46. See the Note and the cases of Crane, Ross, Canover and Davis just above cited. See also *ante*, p. 221, notes 1, 2, 3, for other authorities.

[2] Langdon *v.* Lockett, 6 Ala. 727, (41 Am. Dec. 78).

[3] Simonds *v.* Harris, 92 Ind, 505, and many cases cited *ante*, pp. 221–224.

the differences with regard to money and property *in custodia legis* may be adjusted.

Here may be remarked the different attitude which a county or any municipal corporation presents when it is acting in its governmental capacity from that presented in its ordinary business capacity as a stockholder in a railroad company or a contractor. There is no reason, (unless there be in any State a statutory one) why, in the latter capacity, a county or city should not be garnished or directly sued by attachment. Suits against public corportions in such capacity are of frequent occurrence. It is held that a corporation may bind itself in any way that a natural person may bind himself.[1]

Where a partnership can be sued by the firm name and brought into court by the summoning of any one member of it, it has been held analogous to a corporation. It is treated as a distinct entity, an artificial person, a creature of law, like a corporation. This exceptional character of partnership is found in Louisiana; and though the liability of a commercial firm there is joint and several—*in solido*—yet "during the life of a partnership a partner is, like a corporator in a corporation, liable and made to respond individually only through a judgment against the intellectual being of which he is a component part." And it was concluded that since the Supreme Court of the United States has "finally settled the doctrine that State corporations, domiciled within the State by which they are created, are, so far as relates to the enforcement of rights of action by suit, citizens of that State, although some of the corporators would not be within the jurisdiction, the reasoning * * * leads to the same conclusion with reference to Louisiana commercial partnerships": so it was decided that federal courts have jurisdiction in a suit by an alien against a partnership domiciled in Louisiana, composed of two members, one of whom is an alien—the obligation sued on having arisen in that State.[2]

[1] Kelly *v.* Board of Public Works, 75 Va. 264.

[2] Liverpool, etc., Navigation Co. *v.* Agar & Lelong, 14 Fed Rep. 615, citing Louisville R. R. *v.* Letson, 2 How. 554; Railroad Co. *v.* Whitton, 13 Wall. 283. See Breedlove *v.* Nicolet, 7 Pet. 413, (also cited,) in which

Partnership goods having been attached for a partnership debt, on process against three of the partners, and the suit afterwards dismissed as to two of them for want of jurisdiction —the sureties on the release bond given to the partnership are bound for the amount of the judgment rendered against the remaining partner. Such judgment is held to bind the partnership property under the circumstances.[1]

By noting the character of the partnership, whether its obligations are joint or joint and several, many seemingly conflicting decisions may be reconciled. In Kansas, each partner in a firm is liable for the whole of the partnership debts, and suit may be against any one or more of the partners; and an attachment may issue against any one or more who may be liable thereto; but the attachment can be maintained only against such as are liable. Partnership property may be attached whether the writ runs against the firm or one or more members. The property belonging exclusively to one member cannot be seized under an attachment issued against the firm or against another member and not against himself.[2]

May a common carrier be garnished with respect to goods *in transitu?* It has been held that he cannot when the goods have passed beyond the lines of the State in which the writ is issued; that a railroad cannot be held, though the goods be within the lines at the time of the service of the summons, if it was served too late to convey the necessary orders to the subordinates immediately in charge of the goods; and finally and

judgment was rendered against two resident members of a Louisiana commercial partnership but not against a third one who was an alien —the suit being by an alien.

[1] Inbusch *v.* Farwell, 1 Black, 566: "Although the other partners were not prosecuted to judgment, because they were out of the jurisdiction of the court, still the judgment was rendered upon a partnership debt, to which it would be the duty of the marshal to apply partnership property in preference to the debts of the individual partners. Sureties on the bond were sureties for the partnership, for the purpose therein described, and if compelled to pay the amount they clearly have a right of action against all who composed the firm at the time they assumed the responsibility. Gay *v.* Johnson, 33 N. H. 167; Story on Part. § 375; Collier on Part. § 713, p. 630; Benedict *v.* Stevens, 25 Ct. 392."

[2] Williams *v.* Muthersbaugh, 29 Kan. 730; Ante, p. 156, and cases there cited.

more broadly, that "public policy and the proper discharge of the duties of common carriers, requires that they cannot be held liable upon a garnishee summons for personal chattels in their possession in actual transit at the time the summons is served."[1]

The question is important; and it turns entirely upon the relation of the common carrier to the shipper and owner of the goods, and the capacity in which he holds them. If the carrier has no possession and control such as would preclude the direct attachment of them as the property of the defendant, the goods are not liable to garnishment. It has already been shown that the possession of a traveller's baggage by a landlord, or that of a horse by a borrower, is not such as to preclude direct attachment. If the carrier has possession for no other purpose than to convey from one place to another, and he has the property in process of conveyance, he cannot be required to stop them *in transitu*, even within the State, when such stopping would work injury to himself, interfere with the carriage of the goods of others, render him liable therefor, and put him in worse condition than he was before the summons. The right of stoppage *in transitu* is in the shipper.

Most of the differences have arisen from failure to distinguish between different relations of parties, and from the use of different terms to express the same idea. Those who deny that attachment is a proceeding against a thing, generally admit that it is effectual only against the property attached when the debtor has not been reached by service, nor has appeared. If, objecting to the proper and convenient designation now almost universally employed, they prefer a more round-a-bout way of expressing the same idea as to the character of the suit, no error need ensue. So, those who still state that the purpose of attachment is to compel appearance can hardly mislead so long as they admit that the real purpose is to create and enforce a lien whether there be any appearance or not. So, those who call publication notice "constructive service," work no harm

[1] Bates *v.* Chicago, &c. R. R. Co., 60 Wis. 296. See St. Louis & I. M. R. R. *v.* Larned, 103 Ill. 293, respecting responsibility beyond lines.

so long as they do not give it the effect of service. Many other disputes arising from the misuse, abuse or misapplication of terms, especially the term "jurisdiction," as well as those springing from different party relations, have been pointed out, and their reconciliation essayed, in the foregoing chapters; and is it too much to say that there are no longer any serious differences? The most serious is the doctrine that a court of general powers, possessed of jurisdiction over the defendant and the subject matter, may disregard statutory requisites, and yet have authority over the ancillary proceeding. But the bench and the bar of the country will agree to this proposition: *Jurisdiction cannot be acquired by usurpation.*

If, notwithstanding the variances in statutes, a general family likeness has been presented; if, notwithstanding the duty of expositors to follow the statutes however variant from the prevalent law, their decisions have been found ordinarily to accord with each other in principle; and if, despite the popular view that there are as many different systems of attachment as there are States, the practice is shown to be nearly uniform in all, the general subject is seen to be not wanting in unity.

INDEX.

[THE REFERENCES ARE TO PAGES.]

ABANDONMENT,
of attached property by keeper or receiptor, 283–5.
by the creditor, gives junior attacher first rank, 489.
by creditor, with a part retained, 497.
by court losing jurisdiction, 298.
by means of fire, waste, etc., 313.
lien not lost if constructive possession retained, 286.
sheriff may regain property illegally abandoned by his keeper or receiptor, 285–6.
lien lost if custody actual or constructive is lost, 281, 312–313.
garnishee may recover costs though the attachment be abandoned, 386.
ABATEMENT,
plea in, to dissolve attachment, 428–431.
ABSCONDING,
a generally authorized ground for attaching, 47.
about to abscond, 51.
avoiding ordinary process, 48.
by leaving the State or county, 48.
by secreting within the State, 49, 50.
leaving without intent to defraud, not absconding, 49.
intent inferred from circumstances, 51.
ABSENTEES,
acts of, indicating permanent removal, 43.
declarations of, respecting their absence, 43.
intent of, as to residence, 42–5, 49.
maintaining a home within the State, 44.
protracted absence, 31, 42.
without fixed abode in the State, 45–6.
ACCEPTING SERVICE,
by the defendant, 128.
not by the garnishee, 265.
ACCOUNT. (See Book Account.)

ADDRESS OF THE WRIT,
when amendable by the clerk, 141
ADMINISTRATOR,
when garnishable, 224, 598–9.
when not garnishable, 224–5, 599.
AFFIANT,
in obtaining attachment should be the plaintiff, if present, 82.
if an agent, should swear to his authority, 82.
may be the plaintiff's attorney, 81, 83. (See AFFIDAVIT.)
AFFIDAVIT,
to obtain writ of attachment, 76–112.
necessary, 76.
jurisdictional, 77–79.
must contain, what, 79.
form of, 80.
by whom made, 81–83.
by an agent, 82–84.
signing of, 83–4.
made before whom, 84.
how construed, 85–6.
of the indebtedness, 86–90.
of the character of the debt, 87.
of the items of the debt, 88.
of the grounds for attaching, 90–101.
must be of statutory grounds, 90, 91.
of knowledge and belief, 93–6.
inference and hearsay, 95.
must be certain, 96–98.
alternate allegations, 98–101
amendments, 101–107.
superfluous words, 101.
omission of names, 103.
slight variances, 103.
fatal defects, 106–7.
minor defects, 107.
proof to the satisfaction of the court, 108.
requisites where traverse is not allowed, 108.
requisites to sustain the affidavit, 109.
AGENT OF A CORPORATION,
appointed by it, 247.
to be served with process is usually its president, 239–240.
may be a minor officer designated by it, 247.
attaching creditor cannot effectually serve a minor officer not thus designated, 250.
ALTERNATION,
in allegations of the petition, 98–9.
in stating grounds for the writ, 98–100, 419.
ALIQUOT PARTS,
when proceeds distributed in, 493–4.

AMENDMENT,
of the affidavit, 101–107. (See AFFIDAVIT.)
of the attachment bond, 124–7. (See ATTACHMENT BOND.)
of the garnishee's answer, 368–372.
of the pleading, when it does not release surety on a dissolution bond, 407.
of the writ of attachment, 140, 142.
of the return, 260–265. (See RETURN OF PROCESS.)
when retroactive, 491.
ANCILLARY PROCEEDING,
in aid of the main action, 4, 13.
may be either foreign or domestic, 4.
in effect against property, 12–14.
dependent upon the principal suit, 68.
must fall with its principal, 418.
when separate from the principal, should not precede it, 71.
against property though the principal suit is personal, 72.
essential to the principal action when the debt is not due, 74.
if jurisdictionless, does not defeat the main suit, 76, 533.
requires summons or notification of the debtor, 129, 130.
not necessarily within the jurisdiction because the personal suit is, 332, 549.
dissolved by bonding, surety bound, 407.
ANOMALOUS GROUNDS,
for attachment, 23, 58–9.
ANSWER,
after general appearance, 390–1.
may deny the jurisdiction, 390.
of garnishee must be sworn, responsive, etc., 357.
may be excepted to, 357.
not confined to personal knowledge, 358.
may be by a corporation through its president, or by a firm through a member, 358–359. (See CHARGING THE GARNISHEE.)
APPEAL,
made by special appearer, when, 391–2.
error in ruling, etc., reviewed upon exceptions, 434.
surety bound though his principal discharged as bankrupt, 407.
APPEARANCE OF THE DEBTOR,
when special, 388–392.
what constitutes, 388.
without becoming a party to the suit, 389–390.
to quash proceedings for defects of record, 388.
to object to the jurisdiction, 389.
to move for new trial of an attachment suit *in rem*, 390.
special appearer cannot respond to the merits, 391.
nor plead prescription, 391.
nor move for default, 391, 548.
nor move for a stay, 391, 548.

APPEARANCE OF THE DEBTOR—*Continued.*
special appearer cannot move for a continuance, 391, 548.
nor consent to a continuance, 391, 548.
nor object to the notice, 392.
when general, 392–394.
general when unqualified, 392.
equal to personal service, in effect, 393.
waives irregularities of summons, etc., 393–4, 546–8.
may be followed by personal judgment though the attachment be dissolved, 394.
erroneously entered, may be corrected, 394.
not affected by the withdrawal of the attorney who entered it, 394–5.

ASSIGNMENT,
fraudulent, ground for attaching, 54, 98, 215, 216.
of goods, they may be directly attached though delivered to the assignee, 154.
must be valid as to the attaching creditor to preclude him from attaching directly, 155.
of a note subject to equities, 502.
with reference to attachment, prior and subsequent, 503–6.
general, by an insolvent, 505.
of partnership property, 506.
of money not yet earned, not allowable, 213.
of funds deposited, 217.
may be illegal yet not fraudulent, 54.
fraudulent, how charged in the affidavit, 98.
by non-resident does not dissolve a previous attachment, 414–5.
precludes garnishment, 209.
does not prevent traverse of garnishee's answer setting up assignment, 209, 210.
may be perfected after service on garnishee, 211.
to pay creditors—trustee not garnishable, when, 213, 215.
should be disclosed by garnishee, 214.
if garnishee claims to be assignee, further evidence by plaintiff, 377.

ATTACHING,
directly under a general writ, 151.
specific writ, 151.
what: real and personal property and credits, 152.
stocks, legacies, dividends, etc., 152.
water-craft, 558–560.
not evidences of debt, 153.
what debtor owns and possesses, 153, 164.
not trust funds, 154.
not property held by a trustee, 161.
subject to existing liens, 154.
things fraudulently in possession of a third person, 154.
not things validly assigned, 155.
interest of a partner, 155.
goods of defendant intermixed with those of another, 187.

ATTACHING—*Continued.*
what: non-resident co-debtor's interest, 156.
partnership effects, 156.
dissolved partnership's effects, 156.
debtor's interest in property held in common, 157.
sole-trading wife's property, 158.
not property legally held by a third person, 159.
not goods *in transitu*, when, 160, 601–2.
property held by tenants, lessees, or borrowers not attachable as theirs, 160.
not property or money held in official capacity, 161.
goods consigned to vendee, but not delivered nor paid for, attachable in suit against the vendor, 161.
goods shipped in payment, attachable in suit against the consignee, 162–4.
goods to be weighed, measured, etc., before delivery, attachable as property of the consignor, 162.
goods constructively delivered by bill of sale, as those of consignee, 162–3.
not things exempt by law, 164–166. (See EXEMPTION.)
not all choses in action, 167–171. (See CHOSES IN ACTION.)
how: method of attaching, 171, 181.
land, so as to create lien, 171–2.
land, description, 172–3.
interest in land, 173–4.
personal property, 175–7.
growing crop, 175.
manipulation, not necessary, 176.
use of force, 178–9.
not by trick, fraud, etc., 180.
not by trespass, 179–180.
serving process on the possessor, 178.
leaving copy of the order with the defendant, 181.
taking inventory of goods, 180.
taking property sufficient to satisfy the creditor's demand, 178.
when: time of attaching, 182–184.
as early as possible after issue of writ, 182.
within return day, 182.
immediately when necessity requires it, 182–3.
not after notice of insolvency, when, 183.
not in unreasonable night hours, 183–4.
wrongfully: wrongful attaching, 184–189.
officer not protected against wronged third persons by plaintiff's instructions, 184.
officer must make inquiry, 185.
officer must respect the carrier's lien, 186–7.
surety liable for wrongful seizure under color of office, 188, 551.
damages for wrongful levy. (See DAMAGES.)

ATTACHMENT BOND,
in general, 112–127.
object, 112.
damages, 113.
required before issue of the writ, 115.
amount:
fixed by statute, 116.
statute must be followed, 118.
governed by the amount of the debt, 116.
excess harmless, 117.
when fixed by the court, 118.
obligors:
attaching creditor the principal, 118.
signing by agent or attorney, 119–121.
signing by surety, 122.
signing by surety for his firm, 122.
number of sureties required, 123.
surety, when bound for costs, etc., 124.
surety, when wanted as a witness, 124.
change of sureties, 124–5.
additional security, 124–5.
amendment:
allowed before issue of writ, 126.
not allowed usually after interests of others have intervened, 126–7.

ATTORNEY AT LAW,
may make affidavit for attachment in the absence of his client, 81–3.
may be garnished in suit against his client, 214, 222.
cannot cancel the appearance made for his client by withdrawal from the case, 394–6.

AUDITORS,
of absconding debtor's estate, 462–3.

AUTHORIZATION OF ATTACHMENT,
wholly by statute, 24.
alike in all the States as to principal grounds and causes of action, 31–67.
granted to ordinary creditors to secure ordinary debts, 31.
extraordinary process allowed when the ordinary is inadequate, 31–2.
justifiable on the ground of property indebtedness, and the inadequacy of ordinary process under given circumstances, 570–596.

BAIL. (See SURETY.)

BAIL BOND. (See DISSOLUTION BOND.)

BAILEE,
appointed by the sheriff, 284. (See KEEPER, RECEIPTOR.)

BANK,
insolvent national, cannot be sued by attachment, 143.
when garnishable for deposits, 199, 200.
holding funds of an insolvent firm, 241.

BELIEF.
oath to, for the issue of the writ, 28, 33.
affidavit to "knowledge and belief," 93.
further proof required upon traverse, 29, 93.
BILL OF LADING,
evidence of ownership—transferred by delivery, 164.
BOOK ACCOUNTS,
not attachable as evidence of property or credits, 169–170.
BOND. (See ATTACHMENT BOND, FORTHCOMING BOND, DISSOLUTION BOND, INDEMNITY BOND.)
BOND SUIT AGAINST SHERIFF. (See SHERIFF.)
BOND TO RESTORE,
after judgment *nisi*, 464.
BONDING,
by the defendant, 396–411.
by an intervening claimant, 482.
BURDEN OF PROOF,
on attaching creditor traversing garnishee's answer, 375–6.
on attachment-debtor when plaintiff in reconvention, 440–1.
on garnishee who has answered that he has expended the defendant's funds, to show how and when, 376–7.
on garnishee who has acknowledged that he holds funds to show that he holds in trust, 377.
on garnishee who has answered that he had paid the defendant, to show that he did so without knowledge of the attachment, etc., 380.
on intervenor to establish his allegations, 482.
on plaintiff claiming damages, 455.
on plaintiff-in-rule who contests the affidavit, 432.
on defendant-in-rule when the affidavit is not evidence, 432–3.
on vendee, when, 501.
CAUSE OF ACTION,
ordinary debt due, the principal cause, 23–4, 61, 546.
liquidated and certain, 62, 74, 201.
arising upon contract, 62, 73, 78.
money demands, in some States, 62.
damage claims for torts, in some States, 62–3–4.
claims sounding in damages, in some States, 62.
wrongful conversion of personal property, in some States, 63.
cause must be stated on oath, 87.
what statement is necessary, 87, 89.
amount must be stated, 546.
oath to the debt necessary to the creation of the lien, 88.
oath that the debt is due generally necessary to the creation of the lien, 62, 77–9, 88.
oath must be as required by statute, 88.
jurisdiction in the attachment proceedings dependent upon the oath being as required, 88.
overstatement of the debt not fatal, 88.

CAUSE OF ACTION—*Continued.*
claim need not be itemized, 89.
statement of the debt in exceptional attachments, 89, 90.
"CAVEAT EMPTOR,"
when applicable, 535.
when inapplicable, 537, 543.
"CAVEAT VENDITOR,"
when applicable, 543.
CHARGING THE GARNISHEE,
in general, 341–387.
nature of the proceeding, 341–348.
what garnishment is, 341.
suit by plaintiff for a debt due the defendant, 343.
suit against the garnishee auxiliary and hypothetical, 244–7.
plaintiff seeks to be subrogated to the defendant's rights, 347–8.
interrogatories, how prepared, 348–9.
should be definite, 350.
interrogating corporations, 350.
additional interrogatories, when, 351.
exception to interrogatories, 354.
for irrelevancy, 356.
for want of jurisdiction, 354.
for illegality, 355.
because of previous garnishment, 355.
for want of affidavit, 357.
answers to interrogatories, 357–368.
under oath, 357.
responsive, 357.
not confined to personal knowledge, 358.
by a corporation, 358.
by a firm, 359.
by maker of negotiable note, 364.
by denial of indebtedness, 360.
by plea of fraud, 363.
matter of defence to the main action, 360.
deemed true unless traversed, 362, 372–4.
should not be equivocal, 359.
may plead offset, 367.
may set up anything that would be a defence if the garnishee were sued by his creditor, 365.
contingent liabilities not chargeable, 366.
amended answer, 368, 372.
when allowable, 368.
liberally treated, 369.
second application to amend, 370.
information received after answering, 372.
traverse of the answer, 372–382. (See TRAVERSE.)
charging order, 382–389.
interlocutory, 382.

CHARGING THE GARNISHEE—*Continued.*
when interest is included, 382–3.
when interest is not chargeable, 383–4.
when costs are chargeable, 384.
when costs should be allowed to the garnishee, 385–7.
traverse of the answer, 372–382.
demurrer, 373.
new evidence, 374.
burden of proof, 375–6, 380.
shifting the *onus*, 376–7.
counter-testimony to new evidence, 378.
limits of the examination, 379.
record of the main case considered as before the court, 379.
answer admitting indebtedness, 381.
(See GARNISHEE, GARNISHING.)
CHOSE IN ACTION, SUCH AS NOTES, BONDS, ETC.
not property or credit to be proceeded against, 167.
statutory attaching of, exceptional, 168.
not ordinarily subject to garnishment, 170.
impounding negotiable notes, 169.
bonds, certificates, notes, title deeds, etc., evidences of debt, 170.
credits attachable as incorporeal things, 171.
CITY,
not garnishable in its governmental capacity, 236–9.
why not garnishable, 236–8.
reasons for holding a city liable to garnishment, 238–9.
municipal officers not garnishable, 237.
exceptional practice, 238–9.
CITIZENSHIP,
not essential to residence, 40.
CLAIMANT,
when intervening, puts his title at issue, 481.
may bond attached property, 482.
cannot both attach and claim, 163.
remedies other than intervening, 483.
remedies when he cannot replevy, 557.
surety may become claimant, 484.
CLERICAL ERRORS,
when amendable, 141.
CLERK OF COURT,
an officer and minister of the court, 134.
issues writs of attachment as minister of the court, 134–5.
cannot issue writs when the bench is vacant, 134.
presumed to act by the court's direction, 135.
statutory authorization for him to issue process, 135.
not garnishable as legal custodian, 221.
CO-CONTRACTOR,
if non-resident, his interest attachable, 156.

CO-DEBTOR,
non residence of, no ground for attaching his associate's property, 156.
COLLATERAL ATTACK,
not allowable for mere error, 532.
may disregard a court's decision in favor of its own jurisdiction, 533.
may disregard jurisdictionless judgments, 532, 533.
of judgment in an ancillary proceeding when valid judgment has been rendered in the personal suit, 533–4.
rival attacher may attack, to protect his lien, 534.
by a stranger to the judgment, 534–5.
not permissible after a jurisdictional judgment rendered in a general proceeding against a thing, 534–5.
COMMON CARRIER,
garnishable for funds in hand, 242.
when not garnishable for a passenger's baggage, 242.
not always garnishable for goods *in transitu*, 242, 601–2.
his possession ordinarily that of the consignee, 162.
consignor cannot stop in transit goods shipped in payment, 162.
CONCEALMENT,
by the debtor, of himself, to avoid process, 47.
secreting property in fraud of creditors, 51–2.
secreting himself included in the term "absconding," 49, 50. (See ABSCONDING DEBTOR.)
CONCURSUS,
for the distribution of proceeds, 529, 530.
distribution in aliquot parts, when, 493–4.
CONSIDERATION,
necessary to the validity of a sale, 536.
restitution of the price for want of, 541–2.
CONSIGNMENT,
of goods upon credit does not prevent their attachment in a suit against the consignor, if they have not been delivered, 161–3.
goods shipped in payment, attachable as the property of the consignee, 162–3.
goods shipped in payment attachable as those of the consignee, though the consignor retain a bill of lading, 164.
may be good between contracting parties yet not as to third persons, 163.
when the right of stoppage *in transitu* remains in the consignor, 162.
CONSTABLE,
an executive officer, 134.
as legal custodian, not garnishable, 221, 598.
his sureties held liable on his official bond for tortuous attachments, 551. (See SHERIFF.)
CONSTRUCTION OF ATTACHMENT LAWS, 27, 85–6.
CONSTRUCTIVE POSSESSION,
does not afford ground for garnishment, 201.
in the court, though the actual custody be in the garnishee, 10.

CONSTRUCTIVE SEIZURE,
attaching in third hands, 10.
an interest or intangible thing, 174–5.
land by notice to the tenant, 171–2.
legal interests susceptible of bearing a lien, 173.
legal or equitable interests in land, 173.
a growing crop, 175.
tangible, movable property by merely declaring it seized, a nullity, 176–7.
CONSTRUCTIVE SERVICE,
not effected by publishing notice, 270, 304–5.
CONTINGENCY,
attachment lien depends upon judgment sustaining it, 21, 582–7.
hypothetical till maturity, 21, 580–2.
contingent liability no ground for garnishment, 202.
CONTRACT,
debt due upon, 24.
for the payment of money, 62.
CONTROL,
of property must accompany possession to render it liable to garnishment, 154.
CONVENTIONAL LIENS,
enforceable by exceptional attachments, 22.
CORAM NON JUDICE,
when proceedings are, 8, 28, 388, 533.
CORPORATION,
state, not garnishable, 230.
state, its officers not garnishable, 230.
state, reason for non-liability, 231–2.
subordinate public corporations, 232–3.
county, not garnishable in its governmental capacity, 233.
county, liable in other capacity, 234, 600.
township, subject to same rule, 235.
city and its officers not garnishable, 237.
city liable in other than its governmental capacity, 238–9.
city, reasons for liability, 238–9.
city, reasons against liability, 236–8.
school-district, under the rule of public corporations as to garnishment, 236.
private, liable like natural persons, 239.
may make oath by its chosen representative, 81, 247.
may be served through its authorized officer, 130, 240, 243.
may be garnished wherever it may be served, 228.
may be sued wherever it may be served, 246–7.
garnished for what it holds in the state, 240.
garnished, not for stock owned by shareholder, 240.
bank, garnishable for funds deposited by an insolvent firm, 241.
insurance company, for sum due on a policy, 241.

CORPORATION—*Continued.*
private, agents of insurance company not garnishable for debts due by the company to the attaching creditor, except for property or funds in hand, 241–2.
railroad company liable as garnishee for what it holds of the debtor's property, 242.
railroad company not liable for goods already transported beyond the county, 242.
railroad company not liable as garnishee for goods *in transitu* beyond the state line, or when it cannot stop transportation without loss, 601–2.
railroad company's funds not attachable in the hands of its fiscal agent, 243.
railroad bonds not delivered to stockholders, garnishable in the hands of a trustee, etc., 243.
railroad company, where garnished as a domestic corporation out of its own state, 244.
railroad company mortgaged, when its earnings are garnishable in a suit against the mortgagor, 244.
ticket agents, gate keepers, etc., 244.
captain, purser, clerk of steamer, etc., 244–5.
credits attachable, 249.
served without the jurisdiction, no lien created on its property, 250.
sued by attachment, indebted stockholder may be garnished, 250.
cannot be garnished through its receiver till he has been qualified, 250.
return of the sheriff should name the officer served with process, 257, 267.

COSTS,
follow judgment, 450.
counsel fees, 451–4.
taxed fees and costs, 452.
when garnishee may be required to pay, 384.
when not liable, 385.
when allowed to him, 385–7.
payable out of the thing attached and condemned, 385–6.
due by the party cast in the suit, 387.

COUNTER-CLAIM. (See RECONVENTION.)

COUNTY,
not garnishable in its governmental capacity, 233–4.
(See CORPORATION.)

COURTS. (See JURISDICTION.)

CUSTODY,
must be that of the court, 279–299.
actual, by the sheriff, 279–280.
by the sheriff, though entrusted to a keeper, 279–280.
requires what diligence, 280.

CUSTODY—*Continued.*
may be protected by suit against trespassers, 281.
constructive possession with actual control, 281.
by keepers as servants of the sheriff, 282.
by defendant's warehouseman, appointed keeper, 288.
by receiptors, 283.
property should be described in the receipt, 284.
lost by delivery of property to the defendant, 285–6.
not lost if defendant does not hold adversely to the court, 287.
by defendant under the sheriff, 288–290.
lost by the court, no judgment can be rendered against the property, 298.
by garnishee, is under the court, 294.
independent of both parties, 291–2.
derived from the defendant, and the right of holding is not diminished by the garnishment, 290, 293.
CUSTODY OF THE LAW,
general rule of non-liability to garnishment 218.
property in sheriff's hands, 219.
money in sheriff's hands as proceeds from execution, 219, 220, 598–9.
as surplus, 221.
money in other officer's hands as surplus, 222.
money held by public corporation officers, 221, 298.
by executors, administrators, guardians, etc., 223.
by clerks of court, recorders, etc., 221–2.
by attorneys at law, 222.
money reached by garnishment when no longer in legal custody, 224–5, 598–9.
CUSTOM OF LONDON,
the debtor was not deemed to be in court by his property, 133.
he was defaulted for not coming, after proclamations, 461.
he had a year and a day, after default, for appearance, 461.
his property was not sold till the creditor had given security, 461.
DAMAGE,
suits against officer for attaching without authority, 565.
for not attaching, 566.
for not preserving attached property, 569.
for not replevying property taken from his custody, 567.
for delivering to second attacher, 567.
for illegally paying over funds deposited by the garnishee, 567.
for taking property from a mortgagee, 568.
for attaching exempt property, 568.
for inflicting any injury, 568.
suit against garnishee by attachment debtor, 560–1.
by attachment creditor, 563.
by stranger to the attachment suit, 563–4.
by assignee, 564.
suit against creditor for wrongful attachment, 440–458.

DAMAGE—*Continued.*
cross-action. (See RECONVENTION.)
suit ordinarily must be after dissolution, 444.
prematurity, when it may be pleaded, 445.
joint-suit for damages, 445–6.
suit on attachment bond, 446–9.
the bond has reference only to the proceedings against property, 447.
conditions of the bond, 447–9.
loss of time and business as items of damage, 449.
debt due no excuse for wrongful attachment, 449–450.
suit for malicious attachment, 454–8.
want of probable cause, 454.
certificate of probable cause, 457.
malicious attaching, 455–6.
burden of proof, 455.
acting upon legal advice, 455.
what degree of malice must be shown, 456.
when suit barred by judgment in attachment case, 458.
costs follow judgment, 450.
counsel fees, 451–4.
taxed fees and costs, 452.
ex delicto, ground for attaching in some States, 62, 64.
measure of, 124.

DAY,
for returning the writ, 259.
when the hour should be stated, 486.
fractions of, 258, 266, 588.
dies non, 138.
when Sunday not counted in the term for service, 184.

DATES,
when amendable, 141.
in the return of an executed attachment writ, 258.

DEBT. (See CAUSE OF ACTION.)

DEATH,
of defendant dissolves attachment, 439.
leaves property bound for debt though no personal debtor remains, 571–2.
civil death by insolvency effects the same result, 573.

DECLARATION. (See PETITION.)

DECREE NISI,
after verbal proclamations, 461.
right reserved to plead within a year, 461.
practice in certain States, 461–5.
bond to restore, 463–5.
unnotified debtor cannot have final judgment against him or his property, 465–6.

DEFAULT,
after service, 459.
confirmation of, 460.

DEFAULT—*Continued.*
after verbal proclamations, 461.
after seizure and publication, 466–7.
of garnishee by failure to answer, 351.
of garnishee not if interrogatories have not been served, 352.
setting default aside, 353, 389–390.
when void, 354.
DEFECTS. (See AMENDMENT.)
DEFINITIONS AND DISTINCTIONS, 1–4.
DELIVERY BOND. (See FORTHCOMING BOND.)
DEPOSIT,
fraudulently made, 200.
to the credit of another, 217.
DEPUTY,
duly appointed may attach, etc., 181.
DESCRIPTION,
of attached property. (See RETURN.)
DIES NON. (See DAY.)
DILIGENCE,
required of the official custodian, 280.
DISBURSING OFFICER,
when not garnishable, 221–2, 598–9.
DISCHARGE OF THE GARNISHEE. (See CHARGING THE GARNISHEE.)
DISPOSING OF PROPERTY FRAUDULENTLY,
ground for attaching, 51–60.
DISSOLUTION OF ATTACHMENT, 412–439.
by motion to quash, 412–417.
motion by defendant or other party in interest, 412–415.
when motion may be made, 416.
on grounds certain, 416.
special notice of motion, 417.
quashing for errors patent, 417–425.
radical defects appearing of record, 417.
ancillary suit falls with the principal, 418.
quashing because required facts are wanting, 419.
alternation, 419.
truth of affidavit not in question, 420.
bond fatally defective on its face, ground for dissolution, 420–2.
writ fatally defective on its face, ground for dissolution, 422–3.
seizure illegal or wanting, by return, ground for dissolution, 423–4.
amending after motion to quash, 425.
quashing on evidence beyond the record, 425–434.
writ improvidently issued, 426.
defendant must make general appearance, before offering evidence beyond the record, 426.
grounds, 426.
right to oppose attachment, 426.
methods—motion and plea, 427.
plea in abatement, 428–431.

DISSOLUTION OF ATTACHMENT—*Continued.*
burden of proof, 432–3.
dissolution by final judgment for defendant, 438–9.
by such judgment in the personal action, 438.
release of property, a result, 438.
effect of writ of error, 438.
decree of restoration, 439.
death, 439.
DISSOLUTION BOND,
removes the lien, 402.
given by defendant as of right, 403.
may be for release of part of attached property, 404.
prevents subsequent claim by intervention, 405.
discharges the garnishee, 406.
holds surety to amount stipulated, 407.
holds surety though pleading be amended in minor matters, 409.
holds him after the principal's discharge as bankrupt, 407–8.
when judgment may be entered against surety without notice, 410.
ancillary suit not revived upon failure of surety, 408.
null, if the attachment was so, 409.
judgment for defendant releases surety, 410–411.
(See TRAVERSE AFTER BONDING.)
DISTRAINT ATTACHMENT,
in disuse, 1.
purpose was to compel appearance, 309–310.
dissolved by personal appearance, 509.
DISTRESS. (See DISTRAINT ATTACHMENT.)
DISTRIBUTION. (See CONCURSUS.)
DOMESTIC ATTACHMENT,
to be treated generally as attachment, 4.
DOMICILE,
of personal debtor, 39.
of corporation, 245.
DUALITY OF THE ATTACHMENT SUIT, 12, 19, 132–3, 469.
EJECTMENT,
purchaser protected, when, 531–2.
when statutory requisites have been disregarded, 532.
jurisdictionless judgments not authoritative, 533.
collateral inquiry, 533.
eviction by an owner not a party to the att. proceedings, 534, 548–9.
in general proceedings all are deemed parties, 534.
what the purchaser should ascertain as to title, 535.
no warranty in attachment sale, 535.
creditor liable for misrepresentations, 536.
warranty in judicial sales for judgment-owners, 537–544.
method of sale does not determine warranty, 538–540.
damage due purchaser on eviction, 543–4.
third persons buying before creation of the lien, 544.
when the debtor may convey good title, 545.

EJECTMENT—*Continued.*
title conveyed before the curing of radical defects in the attachment, 546.
judgment with jurisdiction does not cure fatal defects, 547.
eviction of purchaser when publication was not made to the attachment defendant, 548.
(See PURCHASER, WARRANTY.)
EQUITABLE ASSIGNMENT, 60.
ERROR,
in the exercise of jurisdiction, 532–3.
EVIDENCE,
to obtain the writ, 27, 132.
to obtain the writ to the satisfaction of the court, 108.
to sustain the writ, 27, 109.
(See BURDEN OF PROOF.)
EXCEPTIONAL ATTACHMENTS,
what are, 1.
to enforce legal liens, 23, 66, 67.
to enforce conventional liens, 22, 65.
to recover purchase money, 64, 89.
to recover specific property, 66.
not necessary to show any of the usual grounds, 111.
description of property in petition and affidavit necessary, when, 111.
rule of priority in attaching not applicable, 111–112.
EXECUTION,
should be by writ of *vend. ex.*, 523.
when *fi. fa.* is the right writ, 523.
confined to the attachment-debtor's property, 524.
of partnership property, 524–5.
when met by exemption claim, 525–6.
aided by garnishment after judgment, 526–9.
proceeds of, 220.
proceeds of may be garnished after, but not before the judgment of distribution, 598–9.
EXECUTOR,
not garnishable for things and funds in legal custody, 224–5.
liable when they are no longer in such custody, 225, 598–9.
his rights under the will, 224.
EXEMPTION,
of homestead, 165–6.
of property to some stated value, 165.
of whatever is not liable to execution, 165.
waiving the right of, 165–7.
when it should be claimed, 166, 525–6.
EXERCISE OF JURISDICTION. (See JURISDICTION.)
EXPRESSMAN,
when not garnishable, 242.
FACTORIZING PROCESS, (See GARNISHING.)

FAILURE TO DELIVER ON CONTRACT,
an exceptional ground for attachment, 61.
FAITH AND CREDIT,
to judgments in States where they were not rendered, 337–340.
FEDERAL COURTS,
follow State statutes, 326.
have separate jurisdiction, 338.
FEES,
may be recovered as damages, 450–4. (See COSTS.)
FILING AFFIDAVIT, 110. (See AFFIDAVIT.)
FISCAL AGENT,
when not garnishable, 243.
FORCE. (See ATTACHING.)
FOREIGN ATTACHMENT,
that of a non-resident's property or credits, 3.
credit may be the *res* proceeded against, 249.
FOREIGN CORPORATION,
reached through a representative of its own appointment, 246–7.
makes oath by its resident agent, 82.
statutes not uniform concerning, 35.
FOREIGN DEBTOR. (See NON-RESIDENT DEBTOR.)
FORTHCOMING BOND,
nature of, 396.
does not deprive the court of constructive possession, 397.
does not destroy the lien as dissolution bond does, 397.
its obligation is to the sheriff, 397.
the real obligee is the attaching creditor, 399.
should follow the statutory form where any is prescribed, 398.
second attacher cannot replevy, 399.
may be given to release part of attached property, 400.
usual obligation, 400–1.
sureties, 401.
"replevy bond" an indefinite term when used to indicate the forthcoming bond, 402.
annulled by failure to sustain the lien expressly or impliedly by judgment, 509.
FRAUD,
depends upon the *animus* of the person charged, 57.
intent to defraud, 59.
invalidates sale, 541.
in assignment, is ground for attaching, 54.
estops the garnishee, etc., 216.
need not be charged when non-residence is the ground, 4, 47.
need not be charged when removal of property is the ground, necessarily, 56.
FRAUDULENT CONTRACTING OF THE DEBT SUED UPON,
an exceptional ground for attaching, 60–1.
FRAUDULENT TRANSFER, 57–60, 154–5.
FRACTIONS OF A DAY. (See DAY.)

FREIGHT,
on goods not lost by their attachment, 186.
GARNISHEE,
not a party to the issue between plaintiff and defendant, 344.
a party to the side suit between himself and plaintiff, 528.
not a mere witness, 528.
non-resident temporarily in the State not to be made a garnishee, 228.
judgment debtor may be garnishee, when, 596–8.
legal custodian not generally garnishable, 218–225.
legal custodian may be garnishee, when, 598–9.
public corporations not made garnishees, 230–239.
private corporations may be made garnishees, 239–250.
as possessor, must be in control of debtor's property, 194.
as debtor, must owe with certainty, 197.
may claim exemption for the defendant, when, 515.
should not waive service, 265.
cannot object to irregularities, etc., 515, 518.
is like a depositary, 290.
not ordinarily entitled to sell what he holds, 291–2, 294.
may move to dissolve attachment, when, 415.
not condemned to pay more than the judgment against defendant, 514.
not condemned to pay before final judgment against defendant, 513, 516.
discharged for what reasons, 514.
discharged by reversal of judgment against defendant, 517.
protected by the judgment, 520–2.
may plead payment in subsequent suit by his former creditor, 520.
may not plead garnishment, when, 521–2.
sued subsequently to the attachment suit, 560–5.
GARNISHING,
in general, 190–229.
under the writ of attachment, 190.
under the writ of garnishment, 192.
upon special affidavit, when, 192.
upon separate affidavit and bond, when, 193.
by summons and interrogatories, 191.
by trustee process, 193.
of defendant's property, possessed and controlled by a third person, 194.
of credits due defendant from a third person, certain and payable in money, 197–8.
of interest augmenting the credit, 209.
of deposits due, etc., 200.
of joint debts and joint and several debts due to defendant, 205.
not conditional obligations, 201–2.
not property or credits legally assigned, 209. (See ASSIGNMENT.)
not for surplus value of mortgaged property, 204.

GARNISHING—*Continued.*.
not property or credits held officially, 218–225. (See CUSTODY OF THE LAW.)
not partnership credits as credits due to one of the partners, 204–5
not property in trustee's hands to pay creditors, 213–215.
when maker of note liable as garnishee, 206–8.
when wages and salaries exempt, 203.
when legal custodians are not garnishable, 218–225, 598–9.
when non-resident third possessors are garnishable, 227.
when partnership is, though some members non-resident, 227.
when foreign corporation is through resident agent, 228.
when judgment debtor may be garnished, 596–8.
GARNISHING TO AID EXECUTION,
in general, 526–529.
after judgment against defendant, 526.
defeated by defendant's satisfying judgment, 527.
garnishee-in-execution a party—not a witness, 528.
not jointly condemned with defendant, 518–9.
should not be condemned in a specific sum, when, 518
judgment against garnishee may be set aside, when, 519.
protects him, 520–2.
IMPOUNDING NOTES, 169.
IMPROVIDENT ATTACHMENT,
may be set aside, 420.
INADEQUACY OF ORDINARY PROCESS,
justifies the extraordinary, 31, 113.
INCORPOREAL THINGS,
may bear a lien, 173.
interest in land, 173.
right of redemption, 173.
may be proceeded against, 248.
INDEMNITY BOND,
may be required by attaching officer, 147.
amount stipulated, 149.
does not relieve officer from any duty, 150.
without it, indemnity may be implied, 148.
may be sued upon, when, 566.
(See SHERIFF.)
INHABITANT,
synonymous with "resident" in attachment laws, 39.
INJUNCTION,
of execution by garnishee, 519.
IRREGULARITIES,
of service waived by the answer, 266, 392–3.
INSOLVENCY,
with reference to business done by the insolvent, 56.
with reference to assignment, 213–4.
INSTRUCTIONS,
to seizing officer, 149.

INSURANCE COMPANY,
liable to garnishment for sums due on policy, 241.
not for loss by fire where company may rebuild, 241.
agents not garnishable for company's debts, 241.
when subject to foreign attachment, 242.

INTENT,
in removing, 49, 52, 53, 55, 92.
in coming into the State, 45.
to avoid process, 48, 52.
to defraud creditors, 50, 52, 54.
may be inferred from circumstances, 51, 57–8.
in transferring property, 57.
in preferring certain creditors, 59.
charged in the affidavit, 92.

INTERMIXED GOODS,
may be all temporarily seized, 157.
held in common, how attached, 157.

INTERROGATORIES,
to the garnishee, 348–351.
confined to facts of debt to the defendant or property or both, 348
should not be general as to the liability, 350.
addressed to corporations, 350.
may be followed by additional questions, 351.
(See CHARGING THE GARNISHEE.)

INTERVENTION,
unnecessary, when, 470–4.
by persons interested only, 474, 480, 483.
not ordinarily by lien-holder, 474.
by lien-holder in general proceedings against property, 475–6.
by junior attacher, when, 476–9.
after junior has established his own levy, 478.
with charge of fraud, 478–9.
by dispossessed owner, 480.
when title is at issue, 481.
by constructive possessor, 483.
by assignee in bankruptcy, 484.
by parties forced into court, 484.
bonding by intervening claimant, 482.

INVENTORY,
of attached goods, 255–6.

JOINT DEBTORS,
must both be served, 205.
of defendant may plead separate credits as set-off when summoned as garnishees, 367.

JUDICIAL SALES,
when warranted, 537–544.
when not warranted, 535–537.

JUDGMENT,
on confession, as to the lien, 490.
when final as a personal decree after issue joined, 506.
with lien on attached property judicially recognized, 506–513.
with lien implied, 506–7.
where the form should be general, 507–8.
releasing obligors on forthcoming bond by not sustaining the lien, 509.
without prescribed form, though always personal in form, 511.
when greater than appraised value of released property, 512.
appealed, 512.
final against defendant before rendition against garnishee, 513–520.
final against defendant protects garnishee, 520–1.
when *res adjudicata*, 531, 547.

JURISDICTION,
of different degrees, 300–303.
of different significations, 301.
over the debtor, by service or his general appearance, 304.
not by publication, 7, 304–6.
not by publication and attachment of his property, 7, 8, 309–312.
not sufficient for the creation of the lien, 323–5.
does not extend to his property, 550.
over property, by seizing it and serving or notifying the debtor-owner, 312–316.
over property, requires continued custody, 312–313.
requires other notice than seizure, 313–6.
depends upon compliance with the statutory conditions under which it is conferred, 321–8, 548.
special, in attachment cases, 329–334.
not presumed, 330–2.
not included in general jurisdiction, 329–334.
should appear of record, 331–2.
when not appearing of record, judgment may be attacked collaterally, 333.
not acquired by usurpation, 547, 603.
not extra territorial, 334, 338.
of courts in other States, open to inquiry, 336–7.
when entitled to "faith and credit," 340.
federal, subject to State statutes in attachment suits, 325.
between plaintiff and interpleader, 485.
need not be averred in the affidavit, 80.
of ancillary proceeding may be wanting, yet that of the principal suit be maintainable, 76.
with respect to the affidavit, 76–79, 87.
with respect to the writ, 78.
over garnishee, conflict of, 355.
excepted to by special appearer, 388–392.
excepted to or denied in answer by general appearer, 392–394.

JURISDICTION—*Continued.*
personal judgment without citation or appearance, null, 335.
statutes nugatory which attempt to authorize judgment against persons not reached by process, 339.
over perishable goods, 317–8.
in foreign attachments, on default, 319.
KEEPER,
is actual custodian under the sheriff, 282.
may be the defendant's warehouseman, 288.
may be receiptor, 283–4.
when property may be left in defendant's hands with the constructive possession in the court, 288–290.
LAND,
how attached, 282.
of non-resident, 325.
LEVY. (See ATTACHING.)
LIEN,
created and enforced by attachment, 1, 61.
by garnishment, 587–596.
non-existent before attaching as a general rule, 20–21.
hypothetical, 21, 544, 580–582.
created by law on prescribed conditions, 22.
to secure ordinary debt, 577–580.
for funds advanced, 498–9.
when existing before attachment, 65–7, 316.
for labor, etc., on logs, 67.
specific, suits to recover purchase money, etc., 90.
specific, suits on mechanic's liens, etc., 111.
cannot be created by proceedings in a court not empowered to give judgment on the debt, 302.
already securing debt not usually enforceable by attachment, 473.
holders of mature liens no cause to intervene, 472–5.
lose nothing by not intervening, 476.
should intervene in general proceedings *in rem*, 474.
lost by release under dissolution bond, 404–6.
not resuscitated after being lost by bonding, 408.
of junior attacher not ordinarily ground for intervening in the suit of the senior, 476–8.
must be established before being the subject of intervention, where intervention upon it is allowed, 478.
may be contested by junior attacher on the charge of fraud, 478.
may be destroyed by vacation of attachment for fraud, 479.
holders of may intervene to regain possession of that on which the lien rests, 480.
holders of may intervene in bankruptcy proceedings, when, 505–6.
takes rank in the order of the levy, as a general rule, 485.
equal in rank with those simultaneously created, 485, 486, 492.
superior in rank to those on later attachments of the same day, when, 486.

LIEN—*Continued.*
upon goods and credits in third hands from the date of service on the garnishee, 487–8.
first created by garnishment ranks those later, 488–9.
abandoned by first attacher does not affect rights of other attachers, 489.
limited as to duration, when, 489.
lost, cannot be regained in equity, 490.
requires to be perfected by judgment, 490.
cannot be perfected by compromise with defendant so as to rank that of a junior attacher, 491.
equal requires equal share of proceeds, 493–4.
not good against an equitable title, 502.
holds good over subsequent mortgage, 496.
holds good over older unrecorded mortgage in absence of notice, 495.
with respect to unrecorded mortgage, with notice, 496.
marshalled with other liens of any description, ordinarily takes rank by date, 496, 529, 530.
on partnership property, 498.
should be recorded, when, 499.
of creditor in possession, when superior to that by attachment, 499
by convention, created by debtor, after issue of attachment, 499.
cannot displace existing liens or rights, 500.
displaces prior fraudulent assignment, 503.
perfected by judicial decree, 506–513.
general, on the decedent's estate for his debts, 572.
authorized, because of property-indebtedness, 573.
authorized under conditions and securities, 574–7.
not specific, when, 577.
justified and made necessary by the misconduct, etc., of the debtor, 578.
by garnishment, not unjust, when, 579–580.
contingent, 580.
completed by the retroaction of the judgment, 581.
merged in the judgment, 582–587.
LOG-LIEN. (See LIEN.)
MALICIOUS ATTACHMENT. (See DAMAGES.)
MANIPULATION,
not necessary in attaching, 176.
MARRIED WOMAN,
her domicile that of her husband, 38.
her separate property may be attached on statutory grounds when she does business in her own name, 158.
money due her on insurance not attachable in hands of the insurance company in a suit against her husband, 241.
may be made garnishee in a suit against her husband, 528.
MARSHAL,
officer of his district rather than of the court, 134.

MARSHAL—*Continued.*
trespasser by divesting chattel mortgagees of their possession, 146.
trespasser by any wrongful seizure, 78.
may be sued on his official bond, 550.
(See SHERIFF.)
MECHANIC'S LIEN,
attachment to enforce, exceptional, 66.
MINISTERIAL ACT,
may be judicial, 134.
MISNOMER. (See NAME.)
MONEY DEMAND,
a cause of action, 64.
MORTGAGE,
senior first satisfied, 471.
junior sells whole property, 472.
secure without intervention in attachment suit, 473.
unrecorded, when to be respected, 495–6.
MORTGAGED CHATTELS,
not directly attachable, 146.
MORTGAGEE,
may sue officer for disturbing his possession, 552.
MOTION. (See DISSOLUTION OF ATTACHMENT.)
MUNICIPAL CORPORATION. (See CORPORATION and CITY.)
NAME,
when misnomer may be corrected, 141, 517.
in property description, 254–5.
omission of, in affidavit, 103.
NEGOTIABLE NOTE. (See CHOSE IN ACTION.)
NEWSPAPER,
publishing notice to debtor, of attachment, 272.
NOMINAL ATTACHMENTS,
without validity, 309–310.
NON-RESIDENTS,
who are, 34–42.
need not be foreign residents, 35.
have no place at which summons may be left, 36.
intending to reside within the State, 37–8.
domicile, 38–9.
business place, 40.
may have their property attached when they cannot be reached, 46.
may be garnished if in the State with defendant's property, 227.
partnership may be garnished though some members non-resident, 227.
foreign corporation may be garnished through its own constituted resident agent for property in the State, or debt payable there, 228.
temporarily in the State, not ordinarily garnishable, 228.
NOTE. (See PROMISSORY NOTE and CHOSE IN ACTION.)

NOTICE,
of intended suit by the creditor to the debtor of the contemplated defendant, without effect, 215.
of previous conveyance, 500–502.
of unrecorded mortgage, 494–5.
of nullity of title, 542.
with respect to the rank of liens, 494–8.
by recordation, 496, 499, 500–2.
required in admiralty proceedings when they are *in rem*, 315.
in other proceedings *in rem*, 316.
in limited proceedings, such as attachment, 327.
necessary to the power to try an attachment case, when, 303.
published, not sufficient to justify personal judgment, 304–312.
if not given in foreign attachment, final judgment cannot be rendered, 319.
necessarily jurisdictional in default of service, 320.
with respect to the exercise of jurisdiction, 320.
omission of, 321, 325.
unquestionable after general appearance, 392, 395.
must be shown by the prior lien-holder, when, 499.
want of, may be supplied as to defendant yet not hold good as to third persons, when, 546–7.
(See PUBLICATION.)
NULLITY,
of attachment proceedings for want of publication, 271.
for disregard of any condition upon which the statutory authorization depends, 29.
of judgment, 543.
OATH. (See AFFIDAVIT.)
OFFICER. (See SHERIFF.)
OFFICIAL BOND. (See SHERIFF.)
OMISSIONS,
may be supplied, when, 141.
ORDINARY CREDITORS,
are the usual beneficiaries of the attachment remedy, 31.
PAROL EVIDENCE,
cannot contradict officer's return, 264.
admissible to prove facts not returned, 266.
PARTNER,
may prefer his creditors to those of his firm, 59–60.
interest in firm, after payment of firm debts, attachable, 155.
may have firm property attached as his if his associate is a dormant partner, 107.
cannot bind the firm by signing as surety without authority, 122.
PARTNERSHIP,
goods cannot be attached and removed in a suit against a member of the firm, 155.
goods, when attachable in a suit against a partner, 156.
goods of dissolved firm, when attachable, 156.

PARTNERSHIP—*Continued.*
credits not subject to garnishment in a suit against one of the firm, when, 204.
may be garnished in a suit against a member, when, 205.
answer of the garnishee, that he owes the firm, not pertinent when the suit is against a member, 205.
may be garnished though some members are non-residents, 227.
may have its assets condemned after the discharge of a partner, 469.
assets under attachment lien not affected by a junior attachment in a suit against a partner, 487.
property mortgaged, 498.
property assigned, 506.
property in execution, 524, 568.
when sued like a corporation, 600.
PERISHABLE PROPERTY,
when not susceptible of removal, 175–6.
may be sold under interlocutory order, 295.
its cash proceeds represent it, 296.
sale of, not dependent upon jurisdiction to try the cause, 297.
may be sold prior to publication notice, 317.
PERSONAL SUIT,
is the form of attachment proceeding, 5.
in form, is against property in effect when there is no defendant in court, though notified after seizure, 7.
PETITION,
is necessary to the attachment proceeding, 68.
what it must contain, 69.
when it should be filed, 70.
alike whether the judgment be in effect against property only, or personal, or both, 72.
must allege the debt, 73.
may be amended, 75.
POWER OF ATTORNEY,
to sign attachment bond, 120.
POSSESSION. (See CUSTODY.)
PREMATURITY,
when a defence to suit on attachment bond, 445.
PRESUMPTION,
in favor of the attaching officer, 262.
PLACE OF BUSINESS,
with reference to serving attachment, 40–41.
PRIORITY OF LIEN,
is in the order of the levies, 485.
is in the order of the garnishments, 488–9.
anomalous practice, 485.
second attachment laid on the first, 487–8.
according to date as between attachment and mortgage liens, 494.
unrecorded mortgage, when entitled to rank, 495–6.
when creditor holds debtor's property as security, 499.

PRIORITY OF LIEN—*Continued.*
attachment lien not affected by subsequent assignment, 503.
junior over senior, when, 548.
when dependent on time of filing petition, 70.
(See LIEN.)
PRIVIES,
bound by the judgment, 531, 547.
heirs of parties bound as privies' 549.
junior attacher not a privy to the senior's suit, 479.
may be both to interest and contract, 195–197.
purchasers of defendant not his privies, when, 547.
PRIVILEGE,
on attached property, 506–513.
(See LIEN.)
PROBABLE CAUSE,
for attaching, 456–7.
PROCEEDINGS AGAINST A THING,
limited and general, distinguished, 405–6, 558.
limited when under the attachment laws, 14, 15, 406.
not determined by the universality of the judgment, 16.
not inclusive of the suit to fix personal *status*, 16, 17, 18, 306.
not governed by the personal form of attachment suits, 19, 20, 72.
when the debtor is not in court, 71–72.
general, against forfeited property, when seizure precedes suit, 79.
require no summons to any defendant, 129.
require notice, 314–5, 326–8.
allow lien-holders to intervene, 474–5.
PROCESS. (See SUMMONS, WRIT OF ATTACHMENT.)
PROCLAMATIONS,
required before default by the Custom of London, 133.
PROMISSORY NOTE,
not directly attachable, as a general rule, 153.
not to be proceeded against as property or credit, 168.
not a chose in possession, 169.
not "goods" or "effects," 169.
maker of, when garnishable, 206–8.
obligation payable in negotiable notes not reached by garnishment, 217.
impounded, 169.
after maturity, 217, 364.
PROPERTY LIABILITY,
for the debts of its owner, 23, 31, 570–577.
PROPERTY IN COURT. (See CUSTODY.)
PROTECTION OF THE OFFICER,
by valid writ rightly executed, 145–7.
by indemnity bond, 147.
PROTHONOTARIES,
not garnishable as legal custodians, 221.

PUBLICATION,
order for, 268.
what it should contain, 269.
differs from summons, 269–270.
not a command but an invitation, 72.
not constructive service, 270–2.
not substituted service, 72.
necessary on failure of service, 271.
jurisdictional as a statutory condition, 273.
not rendered unnecessary by seizure, 272–3.
should be published, how often, 272.
how long, 274.
should be of record, 275–6, 278.
nugatory without seizure and detention of property, 277.
must be to all persons, when the proceeding is general, 277.
(See NOTICE.)
PURCHASE MONEY,
in suit for, petition and affidavit must describe the property sold, 89.
must state the price, 89.
attachment for, exceptional, 1.
PURCHASER,
must look to the jurisdiction of the court ordering the attachment sale, 531–2.
cannot hold if statutory requisites have been disregarded, 333–4.
not affected by error in the exercise of jurisdiction, 533.
not affected by want of jurisdiction in the ancillary proceeding, in a contest with attachment defendant, if there was jurisdiction in the main case, 533.
may be ejected by stranger to the judgment, when, 534.
may recover of attaching creditor for false representations, when, 536.
buys subject to existing liens, 535.
(See WARRANTY, EJECTMENT.)
QUASHING. (See DISSOLUTION.)
QUASI CORPORATION,
liable to attachment and garnishment, 234.
RAILROAD COMPANY,
when its funds not attachable in fiscal agent's hands, 243.
bonds to be exchanged for stock certificates attachable in the hands of a trustee, 243.
where, though foreign, it may be garnished as a domestic corporation, 244.
mortgaged, earnings garnishable in suit against a mortgagor, when, 244.
shares, when attachable, 245–8.
(See CORPORATIONS.)
RECEIPTOR,
appointed by and holding under the sheriff, 279, 283.
receipt, 284.

RECEIPTOR—*Continued.*
subordinate possession, 284.
may destroy the lien by delivery to defendant, 285–7.
lien not destroyed while the court has constructive possession and control, 287.
sheriff may regain possession, should receiptor wrongfully deliver to the defendant, 285–6.
RECEIVER,
for foreign corporation must become a party to the suit before acting therein, 250.
RECONVENTION,
a cross suit set up in defendant's answer, 440.
a demand for damages for wrongful attachment pleaded in the attachment case, 440.
the *onus* on the pleader, who is "plaintiff in reconvention," 440–3.
attachment may be vacated and damages awarded at the same time, 441.
common practice in several States, 441.
actual and exemplary damages claimed, where, 441–3.
called "counter claim," 441–2.
recovery on the attachment bond, 443.
RECORD,
should show service, etc., in the county, when, 334.
of suit only against property in effect not admissible against the debtor in another action, 8.
of published notice to the debtor, 275.
presumed to be correct, when, 328.
of jurisdictional facts may be examined, when, 336–7, 340.
must show compliance with all jurisdictional requisites, 330–1.
RECORDER,
not garnishable as legal custodian, 221, 298.
RECOUPMENT. (See RECONVENTION.)
REMOVAL OF PROPERTY,
permanent, 43, 49.
temporary, 43–5.
to another county, 49, 50–3.
to another State, 55.
intent to remove, 52, 53.
REMOVAL OF ATTACHMENT SUIT TO FEDERAL COURT,
moved by special appearer, 393.
on the authorized grounds, like other suits, 344.
allowed though plaintiff and garnishee are citizens of the same State, 344.
REPLEVIN,
against attaching officer, 553–560.
not issuable by another court to take property from the court having custody, 553–6.
what remedy when replevin not allowed, 557.
usual remedy in State courts, 557.

REPLEVIN—*Continued.*
exceptional water-craft attachments, 558.
right of States to general proceedings against property, 559–560.
not by intervenor against officer after his plea has been overruled, 484.
RES JUDICATA. (See JUDGMENT.)
RESTORATION,
expressed or implied in judgment for defendant, 438–9.
should follow judgment for defendant, 434.
of attached property should be ordered when the judgment is only personal, 511–512.
general practice, 513.
RETROACTION,
of amendments, 491–2.
of attachment-judgment, to perfect the lien, 581.
of order charging garnishee, to the time of service, 487.
of amendment to writ, when, 491–2.
of sheriff's demand upon the debtor, 503.
RETURN OF PROCESS,
should contain, what, 251.
should state ownership, value, time and mode of attaching, etc., 251–2.
should report only debtor's property or credits, as attached, 252.
creates presumption that the attached property is the debtor's, 253.
cannot affect the title, 254.
should describe the property, 254–5.
should be accompanied by an inventory, when, 256.
should show enough attached to meet the demand, 256–7.
should have certificate of appraisement endorsed upon it, when, 257.
should give the name of any corporation officer served, 257.
should show notice and writ left with tenant where land is attached, 258.
should show service on the person against whom the process was directed, 267.
should give exact date of seizing, 258.
should give exact date of attaching in third hands, 267.
should give names of witnesses of the seizure, when, 258.
may be made at any hour of the day, 259.
is lodged usually with the clerk, 259.
must show authority when made by a deputy, 259.
must be officially signed, 260.
amendable by officer before filing, 260–1.
amendable by officer by leave of court, when, 261.
not amendable, in what particulars, 261.
with respect to errors and omissions, 262.
with respect to reasonable intendment, 262.
renders officer liable to damages, when, 263.
cannot be contradicted by parol testimony, 264.

RETURN OF PROCESS—*Continued.*
not conclusive between parties as evidence of the facts stated, 264–5.
cured of irregularities by the answer, 266.
does not usually show what property or credit has been attached in third hands, 267.
SALARIES,
of public officers, when exempt from garnishment, 239.
of others as wages, when exempt from garnishment, 203.
SALE,
by the debtor before seizure, 500–502.
before amendment of radical defects in the attachment proceedings, 544–550.
invalidated by fraud, 541.
mistake, 541.
want of consideration, 536.
if without an object of sale, 542.
judicial, provoked by judgment owner, warranted, 537–544.
in attachment proceedings should be by *vend. ex.*, 522–5.
of perishable property by the court as custodian, 295.
does not imply jurisdiction over it to try the ancillary suit, 297.
returned by sheriff no evidence that the property sold belonged to defendant, 265. (See PURCHASER.)
SCHOOL DISTRICT,
not garnishable, 236.
SEAL,
error respecting, when amendable, 141.
SECRETING,
goods or person to avoid process, 49–51.
SEIZURE,
not notice in attachment suits, 272–3.
does not answer as notice in other suits against property, 326–8.
creates no presumption of the statutorily required notice, 315–6, 335.
indispensable to suits against things, 303.
cannot be omitted, by statutory authorization, in property actions, 339.
must be followed by the detention of the thing attached, 313.
not altogether analogous in attachment suits to that in general proceedings *in rem*, 316.
gives no jurisdiction to try the cause, 322.
follows application for, in attachment suits, but precedes the information in general proceedings, 422.
is official misconduct, when, 551.
(See ATTACHING.)
SEQUESTRATION,
in exceptional attachments, 23.
of personal property when the sheriff has been divested and cannot deliver it under order, 65, 66, 110.

SERVICE. (See SUMMONS, ATTACHING, RETURN OF PROCESS.
SHERIFF,
is an officer of the county, 134.
holds attached property under the court, 279.
cannot pay over funds without order, 567.
is authorized to appoint sub-custodians, 279.
not bound to turn property over to a receiptor, 284.
should exercise diligence in caring for property, 280.
may recover indemnity from the plaintiff, when, 147–150, 566.
must restore property to defendant, when, 281.
liable for injury done to property under seizure, 566–7.
may leave property with defendant, when, 288–9.
under bond, 396–8.
may replevy property taken from his custody, 567.
has title from demand, where, 503.
liable for not attaching, when, 566.
may defend against an assignor and show fraud in the assignment, 503.
liable to suit on his official bond, 550.
involves his sureties by trespass under color of office, 551.
liable, with his sureties, for molesting lien-holders, 552, 568.
liable to action of replevin, when, 553–560. (See REPLEVIN.)
same rules applicable to constables, U. S. marshals and other attaching officers, 550–560.
(See INDEMNITY BOND, ATTACHING, GARNISHING.)
SIGNATURE,
to the affidavit, 83, 103.
to the jurat, 84.
to the attachment bond, 121–3.
to the return, 260.
SIMULTANEOUS SEIZURES,
create equal liens, 487, 492–3.
levies returned as executed on the same day without any designation of hours, deemed simultaneous, 486.
the limited practice of deeming liens equal when the levies are on the same day, 485.
SLANDER,
excepted as cause for attachment, 63.
SPECIFIC ATTACHMENTS,
to enforce existing liens, 65–7.
by the vendor for unpaid price, 66.
by the sheriff to regain custody, 66.
by laborer to enforce lien upon logs, 67.
lien not created by the attachment, 111–112.
STATE,
not garnishable, 230–233.
STATUTES,
authorizing attachment, uniform in prominent features, 24, 31, 34, 64.
are the only authority for the remedy, 24, 321.

STATUTES—*Continued.*
must be followed or proceedings void, 24, 29, 325.
should be shown, in sheriff's return of writ, to have been followed, 424.
how construed, 27.
not supplied by presumption of authority, 322.
give the right of seizure, 324.
require publication as well as seizure, 325.
observed by federal courts, 325.
STAY ORDER,
to delay proceedings can be moved only by a general appearer, 391.
to delay sale of attached property, 464.
when the debt is not due, 468.
STOCKS,
not attachable as in the hands of a banking or other corporation after delivery to the shareholder, 240.
owned by a non-resident, not attachable as in the hands of the domestic corporation which issued them, 245.
nor of foreign corporation, by service on its agent, 245.
not changed as to their *situs* by the company doing business in another state, 245–8.
not paid for render the subscriber garnishable in a suit against the company to which payment is due, 250.
SUBROGATION,
of creditor to his debtor's right, 347.
SUIT ON SHERIFF'S BOND,
by a third person disturbed or dispossessed, 550, 552.
for breach of official duty, 550.
for trespass, 551.
may include his sureties when the suit is for abuses under color of office, 551. (See SHERIFF.)
SUMMONS,
issued with the petition, 26.
ordinary form, 128.
acceptance of, 128.
cannot be substituted by seizure, 128.
when writ of attachment served on debtor is a substitute, 128.
never issued in a general proceeding against property, 129.
directed to the debtor, 129.
should state the time of the required appearance, 131.
amendable when stating the time erroneously, 131.
erroneously returned, 131, 132.
SUNDAY,
dies non, 138. (See DAY.)
SURETY. (See DAMAGES, DISSOLUTION BOND, FORTHCOMING BOND, SHERIFF.)
SURRENDER,
by insolvent debtor to trustees to pay creditors *pro rata*, 213.
trustees of such assignment not garnishable, 213.

SURRENDER—*Continued.*
creditor not accepting the surrender may garnish, 214.
should await the conversion of the property to money before garnishing trustees, 215.
(See ASSIGNMENT.)
TERRITORIAL LIMITS,
to jurisdiction, 334–340.
TICKET AGENT,
not generally garnishable for money collected as such, 244.
TIME,
of attaching, 182–4. (See DAY.)
of publishing notice, 272–274
of making levy determines rank of lien among competing attachments in most of the States, 485.
of summoning garnishees determines the rank, etc., 488–9.
THREAT,
to assign, indication of fraudulent intent to defeat ordinary process, 58.
TITLE,
of purchaser at attachment sale, 531.
TOWNSHIP,
not garnishable, 231.
TORT,
a cause of action in several States, 63.
TRAVERSE,
of the affidavit, 469.
and plea to the action, consistent, 469.
where not allowed, 108.
should be before or on the trial, 109.
under motion or plea, 427–432.
of the attachment, 425–434, 468.
requires general appearance, 426.
grounds for, 426.
as practiced in different States, 427–431.
as to the necessary evidence, 431–434.
before the issue of indebtedness has been tried, 468.
after dissoultion by bonding, 434–8.
not uniform practice 434–6.
held to be waived by bonding, 437.
held to be not waived, 436–7.
of the garnishee's answers. (See CHARGING THE GARNISHEE.)
TRESPASS,
by the attaching officer, 187.
by taking debtor's property without authority, 565.
by taking goods from a mortgagee, 146.
in attaching partnership goods, 155.

TRIAL,
of the general issue, 468.
of the principal and ancillary action, 469.
of interplea, 470–485.
of claim filed under the original attachment, 477.
TRUSTEE PROCESS,
similar to garnishment, 193. (See GARNISHING.)
TRUSTEES,
of absconding or concealed debtor's estate, 461.
UNDERTAKING. (See ATTACHMENT BOND.)
UNIFORMITY,
of statute authorizations of attachment as to the principal grounds and causes of action, 30–60.
VACATION,
of attachment. (See DISSOLUTION.)
VARIANCE,
between petition and affidavit, 103.
slight, when remediable, 261–3.
VENDEE. (See PURCHASER.)
WAGES,
when not liable to garnishment, 203.
WAIVER,
of service by the defendant, 128.
of service not by the garnishee, 265.
WARRANTY,
of title, not in judicial sales to execute judgment in favor of the judgment creditor, 535.
in judicial sales when they are not in execution of the judgment, but are provoked by the judgment-owner of the property to be sold, 537.
form of, not prescribed, 543.
WATER-CRAFT ATTACHMENTS. (See ATTACHING.)
WIFE. (See MARRIED WOMAN.)
WITHDRAWAL, 394.
WITNESS, surety released to become, when, 124.
WRIT OF ATTACHMENT, 132–147.
its validity necessary to valid judgment, 25.
essentials of, 25.
may be issued with the summons, 132.
issued upon affidavit and bond, 25, 132.
may be effective though debtor not summoned, 133.
may answer as summons when personally served, when, 128.
is judicially issued, though by the court's minister, 134, 138.
void without judicial order, when, 135–6.
issued in a county other than that where the affidavit was made, where, 136.
varies as to form and requisites in different States, 136.
should contain, what, 136–7.

WRIT OF ATTACHMENT—*Continued.*
may be delivered by the clerk to the plaintiff or to the executing officer, 137–8.
should be delivered in the order of the filing of the affidavit, 139, 489.
not amendable, as of right, after it has been executed, 139–140.
when amendment is retroactive, 491–2.
when amendment is not retroactive, 140.
misnomer corrected, 141.
improvidently issued, 426.
directed against no specified property unless the attachment be exceptional, 142.
considered as a preliminary execution, 142.
confined to debtor's property liable to execution, 143.
protects the officer who obeys it, if valid, 144.
does not protect him if he seize a stranger's property, 144–5.
does not protect him if he seize property in the lawful possession of mortgagees, 146.
does not protect him if issued by a court without jurisdiction, 136.
amendable as to the parties, but not third persons, when, 546.
WRIT OF GARNISHMENT,
where required, 192.
WRIT OF SALE,
venditioni exponas, 523.
fieri facias, 523.

THE UNIVERSITY OF CALIFORNIA LOS ANGELES THE LIBRARY OF

UC SOUTHERN REGIONAL LIBRARY FACILITY
AA 000 836 849 0